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21

REPORTS OF CASES

DECIDED IN THE

SUPREME COURT

OF THE

STATE OF NORTH DAKOTA

NOVEMBER, 1899 TO NOVEMBER, 1900

JOHN M. COCHRANE
REPORTER

VOLUME 9

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OFFICERS OF THE COURT DURING THE PERIOD OF
THESE REPORTS.

HON. J. M. BARTHOLOMEW, Chief Justice.

HON. ALFRED WALLIN, and

HON. N. C. YOUNG, Judges.

R. D. HOSKINS, Clerk.

JOHN M. COCHRANE, Reporter.

CONSTITUTION OF NORTH DAKOTA.

Section 101. When a judgment or decree is reversed or confirmed by the Supreme Court, every point fairly arising upon the record of the case shall be considered and decided, and the reasons therefor shall be concisely stated in writing, signed by the judges concurring, filed in the office of the clerk of the Supreme Court and preserved with a record of the case. Any judge dissenting therefrom, may give the reasons of his dissent in writing over his signature.

Section 102. It shall be the duty of the court to prepare a syllabus of the points adjudicated in each case, which shall be concurred in by a majority of the judges thereof, and it shall be prefixed to the published reports of the case.

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF NORTH DAKOTA

JUDSON C. OSBORNE vs. CHRISTIAN L. LINDSTROM.

Opinion filed October 31, 1899.

Limitation of Action Upon Judgment.

Section 5200, Rev. Codes, which limits the time in which actions may be brought upon judgments, applies to judgments that had been rendered prior to the enactment of that section, as well as to judgments subsequently entered; and such statute does not operate upon existing causes of action from the date of the statute only, but, whenever the old statute of limitations had begun to run against a cause of action prior to the enactment of section 5200, the time so run constitutes a part of the limitation period declared by said section.

When Cause of Action Accrues.

A cause of action upon a judgment accrues when the judgment is rendered, and not when leave to sue thereon is obtained from the court.

Statute Concerning Stay Inapplicable.

The commencement of an action on a judgment is not stayed within the meaning of section 5215, Rev. Codes, during the time the judgment creditor is required to obtain leave of court in order to bring suit thereon.

Amendment of Limitation Statute—Reasonable Time Within Which Action May be Commenced.

In all cases when the legislature shortens a statutory period of limitation, and makes the amended law apply to existing causes of action, it must fix a time within which action may be brought upon existing causes of action that would otherwise be barred by the amended law, and, if the time so fixed is so short that it amounts to a practical denial of an opportunity to sue, courts will declare the time unreasonable, and the act unconstitutional, on the ground that it deprives the party of his property without due process of law.

N. D. R.—I

Fixing Time Within Which an Action May be Brought is Legislative Function.

But the power of the courts is limited to passing upon the acts of the legislature, and, if the legislature has failed to act, courts cannot supply the lapse. Fixing the time within which to bring action is purely a legislative function. In so far as the language of the case of *Bank v. Braithwaite*, 7 N. D. 358, 75 N. W. Rep. 244, conflicts with these views, it is disapproved.

Time Between Passage of Act and the Date at Which it Takes Effect Considered.

The time between the date of the passage of an act and the date at which it takes effect will be considered by the courts in passing upon the question as to whether reasonable time had been given in which to bring suit. In such cases, the courts hold that, in postponing the date at which the law should take effect, the courts intended that the intervening time should be given in which to assert rights.

Limitation Depending Upon Happening of a Subsequent Event.

The limitation so fixed may depend upon the happening of a subsequent event, provided such subsequent event cannot possibly happen until after the expiration of a reasonable time in which to bring actions on existing causes of action that would otherwise be barred.

Effect of Limitation Statute Upon Existing Causes of Action.

Chapter 74, Laws 1893, fixed in advance a reasonable time within which actions might be brought on existing causes of action that would otherwise be absolutely barred, under the terms of section 5200, Rev. Codes.

Appeal from District Court, Grand Forks County, *Fisk, J.*

Action by Judson C. Osborne against Christian L. Lindstrom. Judgment for plaintiff, and defendant appeals.

Reversed.

Cochrane & Corliss, for appellant.

It is not necessary that the law lessening the time in which to sue, should contain a provision prescribing the period within which persons holding causes of action must sue. *Braithwaite v. Bank*, 7 N. D. 358; *Bigelow v. Bemis*, 2 Allen, 496; *State v. Jones*, 21 Md. 432; *Burke v. Ass'n*, 40 Minn. 506. In determining what is a reasonable time, the Court must consider the time when the law was approved, and not the time when it took effect. If a reasonable time has elapsed between its passage and approval and the time when it became operative a reasonable period to sue is thereby afforded. *Braithwaite v. Bank*, 7 N. D. 358; *Wrightman v. Boone County*, 82 Fed. Rep. 412; *Duncan v. Menard*, 21 N. W. Rep. 714; *Eaton v. Supervisors*, 40 Wis. 673; *Hedger v. Renneker*, 3 Metc. (Ky.) 255; *Smith v. Morrison*, 22 Pick. 430; *Stine v. Bennett*, 13 Minn. 153; *State v. Jones*, 21 Md. 432; *Bigelow v. Bemis*, 2 Allen 496; *Korn v. Browne*, 64 Pa. St. 55-57; *Pierce v. Toby*, 5 Metc. 172; *Clay v. Iscmingier*, 41 Atl. Rep. 38. The reason of the

rule prohibiting a plaintiff from suing upon a judgment without leave of court, is found in the fact that the common law rule that a party might sue upon a judgment immediately after its rendition often worked hardship to the debtor. § 35, Code C. Pro. 1877; Comp. Laws, § 4831. Under such statutes the fact that leave was not obtained before commencing the suit is not fatal to the action. Plaintiff may obtain an order granting such leave *nunc pro tunc*. *Stoddard Mfg. Co. v. Mattice*, 72 N. W. Rep. 891; *Church v. Van Buren*, 55 How. Pr. 489; *Lane v. Saulter*, 4 Rob. 239. Such statutes do not prevent the assignee of a judgment or the personal representative of the judgment creditor from suing. *Carpenter v. Butler*, 28 Hun. 251; *Hedges v. Conger*, 10 N. Y. Supp. 42; *McButt v. Hirsh*, 4 Abb. 441; *Tufts v. Braistad*, 4 Duer, 607; *Kopper v. Howe*, 2 Hilt. 69; *Smith v. Britton*, 12 How. Pr. 537. Formerly an action upon a judgment could not be brought after twenty years from the time the cause of action accrued. §§ 4833, 4849, Comp. Laws. At the same time the statute now found in Sec. 5215, Rev. Codes, was in force, declaring that the time an action is stayed by statutory prohibition, shall not be considered a part of the limitation period. § 4864, Comp. Laws. If the doctrine of *Weiser v. McDowell*, 61 N. W. Rep. 1094, is sound as applied to this case, it would be equally sound under the laws of 1877 and the result would be that no lapse of time would have barred an action upon a judgment. The revisors in cutting down the limitation to ten years, gave the creditor a year to renew his judgment before it would outlaw.

Bangs & Guthrie, for respondent.

A cause of action upon a judgment does not accrue until the expiration of nine years from the date of the rendition of the judgment. § 5182, Rev. Codes. If the cause of action does accrue at the date of the rendition of judgment, then the same is stayed for the period of nine years and the statutory stay cannot be considered a portion of the time within which an action may be begun, and plaintiff has nineteen years from the rendition of judgment within which to sue upon it. *Weiser v. McDowell*, 61 N. W. Rep. 1094; *Casady v. Grimmelman*, 77 N. W. Rep. 1067. The amended statute of limitations enacted in 1895 does not apply to judgments rendered prior to its passage. § 5146, Rev. Codes; Cooley Const. Lim. 455; Suth. St. Constr. 463; 23 Am. & Eng. Enc. L. 448; *Sohn v. Waterson*, 84 U. S. 596; 21 L. Ed. 737; Potter's Dwarrior on Statutes, 162, n. 9. The reasonable time is computed from the date the new law is passed and not from the time it takes effect. *Bank v. Braithwaite*, 7 N. D. 358-372. But this rule cannot apply to the case at bar because among other reasons it was impossible for the legislature to know when the codes would take effect. The legislature did not by express language make the amended statute apply to existing causes of action, as required by § 5146,

Rev. Codes. In shortening the period of limitation, the legislature must give a reasonable time for plaintiff to bring his suit before his right is barred. Is two months and fifteen days a reasonable time? 13 Am. & Eng. Enc. L. 695-696, 697, 701; Cooley's Con. Lim. 449; Wood on Limitation of Actions, 38; *Lewis v. Lewis*, 7 How. 776; *Terry v. Anderson*, 95 U. S. 628; *Sohn v. Waterson*, 84 U. S. 596; *Turner v. New York*, 168 U. S. 789; *McKisson v. Davenport*, (Mich.) 10 L. R. A. 507; *Culbreth v. Downing*, 121 N. C. 205, 61 Am. St. Reps. 661; *Moore v. Brownfield* (Wash.) 34 Pac. 199; *Bowman v. City*, (Wash.) 49 Pac. Rep. 551; *Kennedy v. DesMoines*, (Ia.) 50 N. W. 880; *Webster v. Am. Bible Society*, (Ohio) 33 N. E. Rep. 297; *Parmenter v. State* (N. Y.) 31 N. E. Rep. 1035; *Wooley v. Yarnell*, (Ills.) 32 N. E. Rep. 891; *Price v. Hopkins*, 13 Mich. 318; *Sprecker v. Wakeley*, 11 Wis. 432; *McKinney v. Springer*, 8 Blackf. 506; *Davis v. Miner*, 1 How. 183; *Girdner v. Stephens*, 1 Heisk. 280; *Woart v. Winnick*, 3 N. H. 473; *Goshen v. Stromington*, 4 Conn. 209; *Bradford v. Brooks*, 16 Am. Dec. 715.

BARTHOLOMEW, C. J. This action was brought in April, 1897, upon a judgment rendered in 1883. The defendant answered, pleading the statute of limitations. To this answer a general demurrer was interposed, which was sustained, and, defendant electing to stand upon his answer, final judgment was rendered against him, from which he appeals, assigning error upon the ruling of the court upon the demurrer.

At the time of the rendition of the judgment upon which the action was based, the period of limitation of actions upon judgments was twenty years. Section 52. Code Civ. Proc. 1877. Such remained the law until the Revised Codes of 1895 went into effect, section 5200 of which reduced the limitation to ten years, and a subsequent section repealed the pre-existing limitation law. The Revised Codes were prepared pursuant to chapter 74. Laws 1893, which created a commission for that purpose. That act prescribed the duties of such commission as to existing laws, and by section 4 provided that, as soon as practicable after the adjournment of the fourth legislative session (which would be the session of 1895), said commission should complete its labors by incorporating with the Codes all the laws of that session, should consecutively number the sections, and index the whole, advertise for 30 days for bids for printing the same, and should superintend the printing of 2,500 volumes thereof. Section 7 provided that these volumes should be delivered to the secretary of state, and that thereupon the governor should issue his proclamation announcing such fact, and accepting such Codes, and that the same should go into effect thirty days after the date of such proclamation. The entire Code of Civil Procedure, as it stands in the Revised Codes, was passed as a single bill by the fourth legislative assembly, and was approved March 2, 1895. The printed volumes of the Revised Codes were completed and delivered

to the secretary of state about December 1, 1895, and the governor issued his proclamation accepting the same, so that they went into effect on January 1, 1896.

It will thus be seen that the judgment upon which this action is based was rendered nearly twelve years before the new statute of limitations was enacted, and more than twelve years before it went into effect. It is the contention of respondent that the limitation law of 1895 applies only to causes arising thereafter, and not to pre-existing causes of action, or that, if it be held to apply to causes of action already in existence, as to the cause of action in this case it is unconstitutional, because it bars the cause of action without leaving a reasonable time within which to assert it. On the other hand, appellant claims that the amended law applies to causes of action already existing, as well as to causes thereafter arising, and that as to the cause of action in this particular case the act is constitutional, because respondent was bound to take notice of the passage of the act and of its terms, and he had all the time from that date, to-wit: March 2, 1895, until the act went into effect, on January 1, 1896, within which to bring his action upon the judgment, and that this was a reasonable time therefor. Some of the questions that necessarily arise in this case were involved in the case of *Bank v. Braithwaite*, 7 N. D. 358, 75 N. W. Rep. 244, and some of them were there ruled. That case is much discussed by counsel in this case, and it is proper that we state some matters concerning that case that may not wholly appear from the opinion filed. The case arose under this same statute. The limitation of ten years had not run against the judgment there involved at the time of the enactment of the amended statute, nor at the time it took effect, nor until three and one-half months thereafter. We held that as to that judgment the law was constitutional, because there remained a reasonable time within which to assert that cause of action, and that no action could be maintained thereon after ten years. But that was not the chief contention in that case, nor the one to which the energies of counsel and the attention of the court were directed. In that case no attempt was made to bring an action on the judgment. Supplementary proceedings on execution had been instituted before the expiration of the ten years, and were pending when the bar of the statute fell. The chief contention was that such proceedings survived, notwithstanding the bar of the statute, and such was the first judgment of the court. But, on further examination and additional arguments of counsel, we changed our views upon that point, and held that with the falling of the bar the judgment was extinguished, and with it died the supplementary proceedings. But, under these circumstances, the minor questions in the case were not, perhaps, as carefully considered as they would have been had they not been kept thus in partial eclipse. We held in that case that the amended law applied to existing causes of action, and with that holding we are well content.

At the same time we recognize all that counsel urge relative to statutory construction. Generally speaking, statutes act prospectively only, and are not given retrospective effect, unless such was the clear legislative purpose. True, this rule has sometimes been referred to in dealing with statutes of limitation, but never, we think, with entire accuracy, except where it has been sought to apply such a statute to a cause of action that had been asserted before the statute was enacted. That, of course, cannot be done. Ordinarily, statutes of limitation act very much like rules of evidence, which, in one sense, they are. They are to be applied to all cases thereafter brought, irrespective of when the cause of action arose, subject, of course, to the universally recognized rule that they cannot be used to cut off causes of action without leaving reasonable time within which to assert them. Our statute declares that "an action upon a judgment or decree of any court of the United States or of any court or territory within the United States" must be commenced within ten years after the cause of action accrued. That language admits of no exceptions. It covers judgments already rendered, just as certainly as it covers those to be rendered. As we have said, the former statute of limitations was in terms repealed. If we say the new act does not apply to causes of action upon judgments already rendered (and, if not to judgments, then to no other cause of action already accrued), then we have that great mass of causes of action without any limitation whatever, and this confessedly, by reason of a statute that was intended to shorten the period of limitations. But it is perhaps useless to adduce arguments or cite authorities to show the legislative intent. Our statute determines that beyond cavil. Section 5149, Rev. Codes, reads "When a limitation or period of time prescribed in any existing statute for acquiring a right or barring a remedy, or for any other purpose, has begun to run before this Code goes into effect, and the same or any limitation is prescribed in this Code, the time which has already run shall be deemed part of the time prescribed as such limitation by this Code." That section can be given no force whatever, unless our statute of limitation were intended to apply to causes of action upon which the old statutes of limitation had commenced to run before the new went into effect. That section is also a complete answer to another argument made by respondent. To avoid the absurdity of leaving a large mass of causes of action without any limitation under the statute, counsel argue that the amended statute does apply to pre-existing causes of action, but as to such it operates only from the time it goes into effect, and that all such causes of action will stand unbarred for ten years from that time. In the case of *Sohn v. Waterson*, 17 Wall. 596, 21 L. Ed. 737, under a statute which barred absolutely all enumerated causes of action that had existed for the limitation period at the time of the approval of the act, and the wording of which the court declared implied that it covered existing as well

as future causes of action, the court, in order to avoid declaring the act unconstitutional as to causes of action that would be barred thereby, construed the legislative intent to be that the act should apply to existing causes of action, but as to them it should operate only from the date at which it went into effect. But we cannot accept this construction, because our statute in terms declares that, where the statute of limitations had begun to run on an existing cause of action, the period so run should be included as a part of the limitation term fixed by the amended statute.

But respondent contends that his cause of action is not barred for another reason. Section 5182, Rev. Codes, reads: "No action shall be commenced upon a judgment rendered in any court of this state between the same parties within nine years after its rendition without leave of the court for good cause shown and notice to the adverse party." Statutes of this character are very common, and their justice and necessity are too obvious for comment. But it is argued that no cause of action accrues until the right to sue becomes absolute, either by lapse of time or leave of court granted; that the judgment in this case was more than nine years old when suit was brought, hence no leave of court was necessary; but that ten years had not elapsed since the right to sue had become absolute by lapse of time, hence the action is not barred. The case of *Weiser v. McDowell*, 93 Iowa, 772, 61 N. W. Rep. 1094, supports that position, not upon any authority whatever, but for certain specified reasons. There was a dissenting opinion in that case, the reasoning of which we much prefer. The legislature of Iowa immediately proceeded to declare that the statute should run from the date of the judgment. Section 3439, Code 1897. Our statute provides that the action shall be brought within the specified time after the cause of action accrues. From the birth of the common law, a judgment has always been regarded as a cause of action. In the absence of restrictions, the owner might sue upon it at once and as often as he desired to harass a defendant. Leave of court cannot constitute a cause of action, neither can it aid a cause of action to accrue. A cause of action accrues when it exists, and a judgment exists from its rendition. A cause of action is complete on the judgment without leave of court. The statute says: "No action shall be commenced * * * between the same parties." It can be enforced by an assignee or personal representative of the judgment creditor. See *Carpenter v. Butler*, 29 Hun. 251, and cases there cited. Yet the nature of the claim—the cause of action—is in no manner changed by the assignment. Again, between the same parties, an action may be brought on the judgment without leave of court, and leave subsequently given *nunc pro tunc*. *Church v. Van Buren*, 55 How. Pr. 489; *Manufacturing Co. v. Mattice*, (S. D.) 72 N. W. Rep. 891. A cause of action cannot be created or caused to accrue *nunc pro tunc*. It is universal, unless saved by special statute, that, if suit be brought on a cause of action not yet

accrued, it must go down. We are clear that the cause of action accrued when the judgment was rendered.

But section 5215, Rev. Codes, declares: "When the commencement of an action is stayed by injunction or other order of a court or judge, or by statutory prohibition, the time of the continuance of the stay is not a part of the time limited for the commencement of the action." This is the same as section 68, Code Civ. Proc. 1877, and has long been the law in this jurisdiction. Respondent contends, as he could not sue upon the judgment until nine years after its rendition without leave of court, that, granting the cause of action accrued at the rendition of the judgment, yet the period of nine years must not be included in the limitation period, and hence his judgment is not barred. We think this position is unsound. The right to sue is not prohibited; it simply has a condition annexed to it,—a condition that will always be removed when any advantage can accrue to the creditor thereby. Actions against a receiver cannot be brought without leave of court, yet his appointment in no manner interferes with the running of the statute of limitations. High, Rec. § § 135, 184. Again, if the principle now contended for is sound, it has always been sound since that statute has been on our books. Prior to the adoption of the Revised Codes, the limitations on judgments, as we have seen, was twenty years; and by section 35, Code Civ. Proc. 1877, no action could be brought upon a judgment without leave of court. If, then, respondent's contention be correct, the statute would not commence to run against the judgment during the entire twenty years, or at any time, unless this creditor saw proper to obtain leave to sue, and the bar would be complete only after the creditor had obtained leave to sue, and failed for twenty years thereafter to avail himself of it. No such result could ever have been within legislative contemplation. We hold unhesitatingly that the amended statute applies to the judgment in question, and by the terms of the statute such judgment was barred when this action was commenced.

There remains the important query, is the statute constitutional as applied to this judgment? That it is not constitutional, if it did not leave reasonable time within which to assert rights under the judgment, is the unanimous voice of the authorities. The cause of action is property, and it cannot be summarily taken away. Turning again to the *Braithwaite Case*, we there held that the time elapsing between the date of the passage and approval of an act and the date when it should go into effect must be considered in determining whether or not the legislature had allowed reasonable time within which to bring actions on pre-existing causes of action that would be barred by the terms of the act when it became effective. Since that case was decided, the Court of Appeals of New York in *Gilbert v. Ackerman*, 159 N. Y. 118, 53 N. E. Rep. 753, 45 L. R. A. 118, has decided the same question directly opposite. Had that decision been reported prior to our decision of the *Braith-*

waite Case, perhaps our profound respect for that court might have induced us to reach a different conclusion, but we think not. Justice Gray, who speaks for the Court of Appeals, says that the point had not previously been decided in that state; and he cites *Smith v. Morrison*, 22 Pick. 430; *Stine v. Bennett*, 13 Minn. 153 (Gil. 138); *Duncan v. Cobb*, 32 Minn. 460, 21 N. W. Rep. 714; *Eaton v. Supervisors*, 40 Wis. 668; *Hedger v. Rennaker*, 3 Metc. (Ky.) 255; *Hart v. Bostwick*, 14 Fla. 180; *Wrightman v. Boone Co.* (C. C.) 82 Fed. Rep. 412,—which he concedes holds adversely to the views announced in the decision. To these cases we would add *State v. Jones*, 21 Md. 432; *Bigelow v. Bemis*, 2 Allen, 496; *Korn v. Browne* 64 Pa. St. 55; *Clay v. Iseminger* (Pa. Sup.) 41 Atl. Rep. 38; *Holcombe v. Tracy*, 2 Minn. 241 (Gil. 201); and *Peirce v. Tobey*, 5 Metc. (Mass.) 168,—all of which are directly opposed to *Gilbert v. Ackerman*. To support that case, *Price v. Hopkin*, 13 Mich. 318, is cited. But that case was largely controlled by a provision in the Michigan constitution. Practically, the New York case stands alone, and, under this condition of the authorities, we are constrained to adhere to our ruling upon this point as announced in the *Braithwaite Case*. We used language in that case, however, which, while not necessary to the decision of the case, needs qualification, and some that needs disapproval. We said: "While it is usual for the new limitation law, which cuts down the period within which certain actions may be brought, to provide, in terms, that all suitors whose causes of action have accrued before the change was made should have, in any event, a specified time in which to sue, yet we do not think that this provision is essential to the validity of such a statutory change, when applied to existing causes of action, provided the time actually left in which to sue is not unreasonable." We shall hold in this case that the legislature need not fix an exact time, provided the time they do fix must, in any event, be a reasonable time; but, so far as the language used in the *Braithwaite Case* imports that the legislature need not fix any time, we think it misstates the law, and we do not wish to remain committed to it. Again, it is stated in the syllabi of that case—although the opinion does not fully bear it out—that, in the absence of a legislative provision fixing a time within which actions may be brought on existing causes of action, "the court will determine in each case whether, after the new law took effect, the suitor still had a reasonable time, under such new law, in which to commence his action." That language was wholly unnecessary in the case, and does not meet our approval. When the legislature, in fixing such time, makes it so short that the right to sue is practically denied, courts will declare such time unreasonable, and refuse to enforce the law. But courts cannot go further, and fix a time different from that fixed by the legislature within which suits may be brought, and, if the legislature has failed to fix any time, the courts cannot, in a given case, supply this legislative lapse. The fixing of the time within which to bring

suit, under such circumstances, is purely a legislative function. It is not within the power of the judiciary. We take this earliest opportunity to correct the errors that inadvertently found their way into the Braithwaite Case.

We have said that the legislature must, in each instance, where a limitation period is shortened, fix a time within which actions may be brought on existing causes of action. In nearly all the cases heretofore cited under this head, that was accomplished by passing the act shortening the limitation, with a provision in it that it should not go into effect until some subsequent date. The courts say that a party is bound to take notice of an act when it is passed. That proposition is fully conceded in *Gilbert v. Ackerman*. The courts also say that passing an act with a provision that it shall not go into effect until a subsequent date is, in legal contemplation, equivalent to passing an act to take effect at once, with a provision that suits may be brought on existing causes of action until a specified subsequent date; and that, if the time between the passage of the act and its taking effect gives a reasonable time within which to bring such action, the statute is constitutional, and will be upheld. The cases go upon the theory that in such cases it was the legislative purpose to fix the time between the passage of the act and the date of its going into effect as the time within which suits might be brought on existing causes of action. This reasoning seems to us entirely sound, and it infringes no constitutional right and works no injustice. But, in the application of this reasoning to the case before us, we are somewhat embarrassed by reason of the unusual circumstances attending the passage of the act here involved. As stated, the Code of Civil Procedure as it stands in the Revised Codes, and including this amendment to the prior limitation law, was passed by the fourth legislative assembly, and approved as one act, on March 2, 1895. From that date all persons must take notice of its passage and of its contents. But the act itself did not fix the time when it should go into effect, nor was that time fixed by the fourth legislative assembly. It was fixed by chapter 74, Laws 1893, being the act which created a revising commission, with authority and directions to revise the whole body of our statutory law. It is urged that it cannot be said, with reason, that the legislature, in passing that act, had any intention of fixing a time within which actions might be brought upon existing causes of action, because, in fixing the time at which the laws as revised should go into effect, it had other and more general purposes to subserve, and because it did not know and could not know that any change would be made in the existing limitation statutes. We recognize the difficulties. In no case that we have found have any such conditions been presented to a court. But we do not think the difficulties insurmountable, or such as take the case out of the operation of the principles already announced. While it is true that the legislature of 1893 could not certainly know that the legislature of 1895 would shorten the limita-

tion period upon the recommendation of the revising commission or otherwise, yet it did know that the commission that it had created had full power to recommend such a measure, and that the legislature of 1895 would almost certainly pass it if recommended. It knew, too,—for we must presume that it knew the law, and we must presume that it intended to act within the provisions of the constitution when it did so act,—that, in case the limitation period was shortened, a reasonable time must be given within which to bring actions upon existing causes of action. The fact that, in view of the magnitude of the project which it had inaugurated, that legislature may have had other reasons, and good reasons, for directing that the great volume of statutory law, revised as was contemplated, should not go into effect until some time subsequent to the enactment of such revision, is no legal argument to show that it did not act upon the particular reason here specified. We have no right to assume that it acted upon one good reason, to the exclusion of another good reason. Rather, we are bound to assume that it acted upon all good reasons, and intended to act upon all.

But, again, the legislature did not fix a specific time for the commencement of actions upon existing causes of action. It was limited by the happening of a subsequent event, the time of which was uncertain. It is urged that, as the legislature must fix a reasonable time, it necessarily follows that such time must be so specific and certain that parties can determine, when it is fixed, whether it be reasonable or not. We think that is correct, and we think this act meets this requirement. In other words, where the event that is to limit the time cannot happen until the expiration of a reasonable time, the statute meets the constitutional requirement as fully as if it selected a particular date as the earliest date upon which the event could happen, and declared that such date should limit the time. The practical difficulties that prevented the fixing of a date certain are very obvious. It was not desirable that the Revised Statutes should go into effect and stand as proof of the laws until they had been printed and placed in the hands of those whose duty it was to enforce the law. But it was desirable that they should go into effect as soon as that was accomplished. The legislature could not say that they should go into effect in six months or a year after their passage, because the printed volumes might not be ready. If the time was fixed at two years, the printed volumes might be ready much before that time. The wisest course left to it was the course pursued.

Was the time thus limited necessarily a reasonable time? We must give the legislature credit for ordinary business knowledge, and the court must exercise the same in passing upon the question. The law required the commissioners, after the adjournment of the fourth legislative assembly, to incorporate all the laws passed by that assembly with the general body of the statute law, under the

proper subjects and in the proper place. The whole was then to be consecutively numbered by sections, and an index prepared. The amount of work being thus determined, they were to advertise for thirty days for bids for printing the same. Thereafter contracts were to be entered into, and all the work incident to the publication and binding of the volumes performed. After their completion, they were to be delivered to the secretary of state, and the governor would thereupon issue his proclamation accepting the same, and thirty days thereafter the laws should go into effect. It will be noticed that the law fixes two periods, of thirty days each, aside from the time that must be employed in preparing the matter and completing the volumes. As a matter of fact, it was ten months from the passage of the act until it went into effect. The members of the legislature, as men of ordinary business knowledge, knew that the law could not possibly go into effect, under the terms of the statute, within six months from the date of its passage. The fourth legislative assembly, that passed the amended limitation law, had no occasion to fix a time within which actions might be brought upon existing causes of action. That time had already been fixed by its predecessor. It placed the law within the operation of an existing statute, which fixed such time, and this was equivalent to direct action on its part. Much shorter periods have been upheld. *Stine v. Bennett*, 13 Minn. 153 (Gil. 138); *Bigelow v. Bemis*, 2 Allen 496; *Smith v. Morrison*, 22 Pick. 430. We see no reason why we should not uphold this statute. There is no language in it that in any manner militates against our construction. If we place upon it a different construction, we are forced to declare our limitation law unconstitutional as to existing causes of action that would be barred thereby. That result it is our duty to avoid, if a reasonable construction of the wording will permit. Hence we hold that chapter 74, Laws 1893, fixed in advance a reasonable time within which actions might be brought on existing causes of action that would otherwise be absolutely barred by the terms of section 5200, Rev. Codes. It follows that respondent's cause of action was barred under the allegations in the answer, and the demurrer to the answer was improperly sustained. The District Court of Grand Forks county will set aside its judgment rendered in this case, and set aside the order sustaining the demurrer to the answer, and enter an order overruling the same. Reversed. All concur.
(81 N. W. Rep. 72.)

LINA ERICKSON vs. ANNIE E. KELLY.

Opinion filed October 28, 1899.

Assignment—Delivery.

A written instrument does not take effect until it is delivered, and, to be effectual, such delivery must be intentional, made with the

purpose that the instrument shall become operative, and have the effect to place it beyond the right to be recalled.

Evidence Discloses No Delivery.

The plaintiff's right to equitable relief in this action is wholly dependent upon a certain written assignment which she alleges was executed and delivered to her by the defendant. *Held*, under the evidence, that there was no delivery of such assignment, and it never became operative, and hence plaintiff is not entitled to relief:

Certificate to Stated Case—Sufficiency.

The certificate of a trial judge to a statement of the case properly settled and allowed in a case tried under section 5630, Rev. Codes, as amended by chapter 5 of the Laws of 1897, reciting that such statement "contains all of the evidence introduced," is sufficient to permit us to review the entire case upon appeal, provided it does not appear affirmatively elsewhere in the record that such statement does not contain all of the evidence offered at the trial.

Appeal from District Court, Traill County; *Pollock, J.*

Action by Lina Erickson against Annie E. Kelly. Judgment for plaintiff. Defendant appeals.

Reversed.

Tilly & McLeod, for appellant.

J. F. Selby and Swenson & Norman, for respondent.

YOUNG, J. This is an action on the equity side of the court, in which plaintiff asks that the defendant be required to execute and deliver to her a deed of conveyance of certain lands situated in Traill county. She also asks a money judgment for the value of their use for the year 1898. A trial was had in the District Court, under section 5630 of the Revised Codes as amended by chapter 5 of the Laws of 1897, in which the plaintiff was successful. Defendant brings the case here for a trial anew.

It will be necessary, to an intelligent understanding, to state a few facts, some of which are prior and others subsequent to the date of the particular transaction which furnishes the basis of the present action. On April 13, 1891, one A. L. Plummer was the owner of the tract of land here involved. On that day he made a written contract for the sale of the same to Mrs. A. E. Kelly, the defendant. Under its terms, she was to pay the purchase price by applying one-half of the crops grown thereon each year. It appears that she had complied with the conditions of the contract, and was not in default in the spring of 1895, when the transaction with Mrs. Erickson took place. Plummer, however, had assumed that the contract was forfeited, and during a portion of the year 1894, and in the spring of 1895, was attempting to get and keep possession of the land. Mrs. Kelly was at this time living in Minneapolis. Her husband, Thomas Kelly, was in Traill county, looking after her interests, and it appears that at all times prior thereto he had acted for her in a general way, either in farming the land or in procuring a tenant to work it. When Plummer attempted to retake the land,

Mr. Kelly consulted one P. G. Swenson, an attorney, at Hillsboro, and at all times thereafter, and up to December 21, 1897, Mr. Swenson acted as attorney for Mrs. Kelly in all of the negotiations, as well as the protracted litigation which followed relative to the sale contract. In the spring of 1895, Plummer brought an action to cancel and annul the contract for certain alleged defaults. Mrs. Kelly about the same time instituted an action to compel Plummer to give her a deed. The two actions were consolidated, and tried as one, in the District Court. That court found for Mrs. Kelly. An appeal was taken, and upon a retrial of the case in this court, Mrs. Kelly was again successful, and a judgment was entered in her favor requiring Plummer to execute and deliver to her a deed of said premises upon the payment of the sum of money which this court found to be due upon the sale contract. See *Plummer v. Kelly*, 7 N. D. 88, 73 N. W. Rep. 70. The opinion of this court was handed down November 3, 1897. On December 21, 1897, Plummer executed and delivered a deed to Mrs. Kelly in compliance with the judgment of this court, and received from her the amount of money which the court had determined was still due upon the contract. On the 19th day of the following month, Mrs. Erickson commenced this action to compel Mrs. Kelly to deed the land to her, and as grounds for such relief alleges in her complaint that this sale contract between Plummer and this defendant, which had furnished the basis of all the litigation to which we have referred, was in fact assigned and set over to her on or about the 11th day of April, 1895, by a written assignment executed and delivered to her by the defendant on said date, which assignment was substantially as follows: "This agreement, made this — day of April, A. D. 1895, by and between Mrs. A. E. Kelly, of the County of Hennepin, State of Minnesota, party of the first part, and Lina Erickson, of the County of Traill and State of North Dakota, party of the second part, witnesseth that the party of the first part, for and in consideration of the sum of \$1,280, has sold, assigned, transferred, and set over, and by these presents does sell, assign, transfer, and set over, unto the said party of the second part, all her right, title, and interest in and to a certain contract for the purchase of the west one-half (W. $\frac{1}{2}$) of section twenty-nine (29), in township one hundred and forty-five (145) north, of range fifty-three (53) west, made and entered into between said Mrs. A. E. Kelly and one A. L. Plummer, which contract bears date the 13th day of April, A. D. 1891, and was filed for record in the office of the register of deeds in and for Traill county, North Dakota, on the 5th day of September, 1894, and was recorded in Book X of Deeds, on pages 222 and 223." It is further alleged "that, at the time of the execution and delivery of the written agreement by defendant to plaintiff as aforesaid, the plaintiff executed and delivered to defendant, as payment for the consideration of said agreement, her four certain promissory notes, as follows: One note for \$280, dated April 11, 1895, due November 1, 1895; one note for \$250, dated April 11, 1895, due November

1, 1896; one note for \$250, dated April 11, 1895, due November 1, 1897; one note for \$500, dated April 11, 1895, due November 1, 1898,—all of said notes bearing interest at the rate of 8 per cent. from date until paid." In an amendment to the complaint, it is alleged that plaintiff also executed and delivered to the defendant a second mortgage upon said lands and certain town lots to secure the payment of said notes; and, in what is called a "supplemental complaint," that the defendant wrongfully withheld possession of said lands from her for the year 1898, and that the value of its use is \$900. In her several prayers for relief plaintiff asks judgment that the contract be specifically performed, and that defendant be compelled to execute a deed of conveyance, for \$2,000 damages for the breach of the contract, \$900 for the use of the lands for 1898, \$100 for expenses in obtaining possession, and for costs and disbursements of this action. The plaintiff's claim to an interest in the land in question, and right to obtain a deed therefor, is wholly based upon the written assignment of April 11, 1895, which is above set out at length. It is not alleged or contended that there was any other contract, or that plaintiff acquired any interest, save through this instrument. The plaintiff asks that this contract be specifically performed, and counsel in his brief treats the action as one for the specific performance of a contract to sell and convey real estate.

In this there is an evident error as to the nature of the instrument upon which they rely; for a reference to the contract will show that it is not an agreement to sell, and contains no executory obligations resting upon either party, but, on the contrary, purports to represent an absolute transfer of the Plummer contract immediately and without conditions. It is patent, if this assignment was executed and delivered by the defendant to the plaintiff as alleged, that subsequent to April 11, 1895, the date of the alleged delivery, the defendant was divested of all interest in the sale contract, and that the plaintiff on that date became the owner of, and succeeded to all of, the interests and rights which the defendant had therein on that date. While it is true this written assignment contains no promise which will furnish a basis for a decree for its specific performance, yet it is manifest that a court of equity, having assumed jurisdiction, may lay hold of the title in Mrs. Kelly's hands, and declare its nature, and at the same time adjust the rights of the litigants, and also direct a conveyance to the plaintiff, if that were necessary, if it satisfactorily appeared that the defendant had in fact acquired the title in violation of an assignment of her interest and right to acquire the same. Defendant's answer admits that the assignment was signed by her, but places its delivery in issue. Plaintiff's right to any relief depends upon whether or not the Plummer contract was assigned to her, and the answer to that question is dependent upon another, namely, was the written assignment delivered so as to become operative? for it is elementary that a written contract does not become binding until it is delivered.

Bish. Cont. § 349; Beach. Mod. Cont. § 8; 1 Add. Cont. 48. And such instruments do not take effect until delivered with an intent that they shall become operative. *Hibbard v. Smith*, 67 Cal. 547, 4 Pac. Rep. 473, and 8 Pac. Rep. 46. "To constitute a delivery, there must be an intention to part with the control over the instrument, and place it under the power of the grantee, or some one for his use." *Hotchkiss v. Olmstead*, 37 Ind. 74. See also, *Vaughan v. Godman*, 94 Ind. 191; *Fitzgerald v. Goff*, 99 Ind. 28. The instrument must have gone beyond his power to recall. *Younge v. Guilbeau*, 3 Wall. 636, 18 L. Ed. 262. See, also, *Standiford v. Standiford* (Mo.) 10 S. W. Rep. 836, 3 L. R. A. 299; *Stokes v. Anderson*, (Ind.) 21 N. E. Rep. 331, 4 L. R. A. 313, and notes. Further, the party relying upon a written instrument has the burden of showing a delivery. Has plaintiff shown that the defendant delivered to her the written assignment of April 11, 1895? A careful study of the evidence has satisfied us that she has not, and that said assignment was not delivered, and that plaintiff, therefore, acquired no interest in the Plummer contract, and accordingly must fail in this action. There is a vast amount of testimony in the record relating to conversations and matters occurring subsequent to the date the assignment is alleged to have been made and delivered, but the evidence relevant to the issue on the delivery is brief. Kelly testified that, when the difficulty with Plummer arose, he consulted with Swenson as an attorney; that the plaintiff proposed to buy the contract, and pay Plummer, etc.; that he, together with plaintiff's husband, went to Swenson, and the written assignment was drawn up by him; that he sent it to his wife, in Minneapolis, stating to her in the letter accompanying it "that Mrs. Erickson had offered us between \$1,500 and \$1,600 for the land, and advising her to sell it rather than to go to law with Plummer"; that the assignment was received back, in due course of mail, from his wife, and left with Swenson, who was acting for Mrs. Kelly in reference to the proposed sale as well as in the Plummer controversy; that the assignment was returned to him by Swenson, to be sent to his wife for acknowledgment; that he sent it to her, and informed her that plaintiff did not now intend to pay cash, but to give notes secured by a second mortgage upon the land and other property; that defendant refused to accept notes, and instructed him not to close the deal, and that she retained the assignment; and that he had no other authority to act for her than as contained in her letters. Mrs. Kelly's testimony on this point is as follows: "I know nothing about any arrangement which my husband made for the sale of the Plummer contract to Mrs. Erickson, except what he wrote me. When he first wrote to me about his arrangement with Mrs. Erickson, he sent me a sort of assignment of the Plummer contract for me to sign. He told me in his letter that if I wanted to take \$1,500 or \$1,600 in cash I could do that, or else the place would go into law. I signed this paper, and returned it to him. Later on, the paper was returned to me for correction. In the letter

he wrote to me at that time he informed me that they could not furnish the cash, and that I would have to take a second mortgage on property at Clifford, and also a second mortgage on the land. I refused to do so, and so notified him." All this occurred on or about April 11, 1895. It is undisputed that the assignment did not go beyond Swenson's possession, and into the control of the plaintiff. Likewise, it is clear that the notes and mortgage which plaintiff executed and left with Swenson as the consideration for the assignment did not go from his hands, and into defendant's control. Mrs. Kelly testified that she never saw the notes or mortgage until they were tendered to her by Swenson at the commencement of this action, more than two and one-half years after the time when the assignment was signed, and when three of the notes were past due. It seems probable that the assignment would have been delivered when first received from Mrs. Kelly, and the consideration paid, had the plaintiff been able to have settled with Plummer, by inducing him to accept the balance due him, or by obtaining an acknowledgment of the amount due and that the sale contract was valid, and thus assure herself that she was not buying a contract that was void, and the certainty of a lawsuit. Plaintiff's intention to consummate the purchase is shown by the fact that Swenson on her behalf arranged for the amount of money which they estimated was due Plummer. This was obtained from one Haber, and was placed by him temporarily in Swenson's hands, to be used as a tender to Plummer. If accepted, and a deed should be given to the plaintiff, it was to be secured by a first mortgage on the land, to be executed by her. The tender was made and refused, and the money received from Haber returned to him by Swenson on the same day. Neither money nor notes for the purchase price of the assignment were given or offered to the defendant or her husband. We have stated sufficient facts to show there could not have been a delivery which would bind Mrs. Kelly; for the only authority which she ever gave was contingent upon the payment of a cash consideration of between \$1,500 and \$1,600, and this was not paid. Further, we are satisfied that there was not even an unauthorized delivery of the instrument between the parties present at Hillsboro. Mr. Swenson was asked this question: "Q. What was the understanding between Mrs. Kelly and Mrs. Erickson as to the delivery of these papers?" His answer was this: "If the deed could have been obtained from Mr. Plummer that day, the papers and money, of course, would have been delivered; the money delivered to Mr. Plummer, and part of the money and a mortgage and the notes to Mr. Kelly, for Mrs. Kelly;" and elsewhere he testified that he still had the notes and mortgage in his possession up to the time this action was begun, and they had not been offered to the defendant until after she had obtained a deed pursuant to the decree of this court. Furthermore, it does not seem credible that any of the parties understood that the assignment had become operative; for within a few days after Plummer's refusal to deed, Mrs. Kelly

was made the defendant in an action to cancel the sale contract, and she began her action for specific performance, in her own name and right, and paid all of the expenses of that litigation, amounting approximately to \$900,—a course utterly inconsistent with the idea that she had transferred her interest; for, if she had in fact done so, she had no further interest in the sale contract, and owed no obligation to this plaintiff to institute the suit. Further, during the two and one-half years that the suit was pending, no claim was made that Mrs. Kelly was not the real party in interest, although Mr. Swenson was her attorney in the case, and the plaintiff was at all times cognizant of the condition of the litigation, and plaintiff was in fact a witness in the case. It was not until Mrs. Kelly had secured a deed at an expense which her circumstances could illly afford that the plaintiff came forward, and tendered the notes and mortgage, and asserted that the assignment of the sale contract was absolute at its date. It is plain, too, that the plaintiff did not consider herself bound by the assignment; for Mr. Swenson, testifying on her behalf, said: "I do not presume they (the notes and mortgage) would have been delivered to Mrs. Kelly, if the action brought by her against Mr. Plummer had gone against her." The fact that the evidence shows that the land had almost doubled in value may have had something to do with the origin of this action to recover it. The conclusion is irresistible that the assignment was not delivered and did not become operative. Hence plaintiff must fail.

At the close of respondent's brief it is urged that this court is without jurisdiction to try the case anew, for the reason that the certificate of the trial judge attached to the statement of the case does not state that it "contains all of the evidence offered at the trial in the District Court." The objection is not well taken; neither is counsel's position sustained by the decisions of this court cited in its support. In *First Nat. Bank v. Merchants' Nat. Bank*, 5 N. D. 161, 64 N. W. Rep. 941, the certificate did not show that the statement contained all of the evidence offered, but merely that it contained all of the testimony "taken" at the trial. In *Bank v. Davis*, 8 N. D. 83, 76 N. W. Rep. 998, the certificate of the trial judge contained no reference whatever to the evidence, and the stipulation of counsel upon which it was based made it apparent that all of the evidence offered was not in fact in the record. In *Edmonson v. White*, 8 N. D. 72, 76 N. W. Rep. 986, the certificate was that the statement contained all the evidence "considered" by the trial court, and it also appeared affirmatively in the record that it did not contain all of the evidence offered. The language used in the certificates in the cases cited was insufficient, because it showed affirmatively that the evidence embodied in the record was only such as the trial court had considered and acted upon, and was not all the evidence offered. In the case at bar the certificate attached to the statement of the case states that it "contains all of the evidence introduced." In the absence of anything in the record to

show that all of the evidence offered is not in the statement,—and there is no claim that it is not,—we think that the certificate is sufficient. It is to be presumed, when it does not appear otherwise, that the trial judge received all of the evidence offered or introduced by the parties, as he is required by the statute to do. Under these circumstances, a certificate that the statement contains all the evidence “introduced” is equivalent to all the evidence “offered,” and is sufficient. The judgment of the District Court is reversed, and that court is directed to enter a judgment dismissing this action. Appellant will recover costs of both courts. All concur.
(81 N. W. Rep. 77.)

MCCABE BROTHERS v. AETNA INSURANCE COMPANY.

Opinion filed October 31, 1899.

Insurance—Parole Contract for Renewal.

A parol agreement to renew a policy of insurance, entered into by an agent having authority to renew policies, *held* to be the agreement of the principal, and not of the agent.

Authority of Agent to Bind Company.

An insurance agent, having authority to solicit insurance, to accept risks, to agree upon and settle the terms of insurance, and to issue and renew policies, has authority to make a preliminary parol contract binding upon his principal, to renew a policy about to expire. Certain provisions of the policy respecting renewals, waivers, etc., *held* not to apply to such preliminary contract.

Prepayment of Premium.

Prepayment of premium for renewal term is not essential to the validity of such preliminary agreement to renew.

Amendment of Pleading—Waiver.

Where an amendment of the complaint at the trial is allowed on condition that defendant be given sufficient time to prepare to meet the issues as amended, and thereafter defendant announces himself ready, and proceeds to trial on the amended pleadings, he will not be heard to urge that he was prejudiced by reason of the allowance of such amendment.

Evidence of Custom to Extend Credit.

Evidence of custom on the part of the agent to extend credit for premiums *held* admissible.

Proof of Parole Agreement.

Evidence that plaintiffs relied upon the preliminary agreement to renew the policy, and that, had they not believed that the policy was renewed, they would have procured other insurance, also *held* competent.

Instructions Approved.

The court's charge to the jury examined, and *held* to state the law correctly.

Appeal from District Court, Pembina County; *Sauter, J.*
Action by McCabe Bros. against the Aetna Insurance Company.
Judgment for plaintiffs, and defendant appeals.
Affirmed.

W. J. Burke and Kitchel, Cohen & Shaw, for appellant.

Templeton & Rex and *J. D. Stack*, for respondents.

FISK, J. This litigation arose out of a transaction wherein plaintiffs allege that defendant, through its authorized agent, orally agreed to renew a certain policy of insurance on certain property belonging to the plaintiffs. It is conceded that on November 13, 1896, the defendant, through its agent, William McBride, at St. Thomas, duly issued and delivered to plaintiffs its certain policy of insurance, whereby it insured against loss by fire certain grain contained in plaintiffs' elevator at Glasston, in the sum of \$2,000, for the period of one month. It is also conceded that after the expiration of said period of one month, and on December 24, 1896, said grain was totally destroyed by fire, and that plaintiffs' loss thereby exceeded said sum of \$2,000. Plaintiffs contend that on or about December 5, 1896, they entered into a parol agreement with defendant, through its said agent, whereby the defendant promised and agreed to renew said policy, at its expiration, for the further period of one month, and that defendant, through its said agent's neglect, failed to renew said policy, and this action was brought to recover damages for the breach of said parol agreement. The defendant flatly denied the existence of such agreement, and there is considerable evidence in the record tending to corroborate defendant's contention; but the jury having found for the plaintiffs on this issue, and there being a substantial conflict in the testimony, this court must assume that such agreement was made. Counsel for appellant urge numerous assignments of error, which we will consider in the order in which they are presented.

1. They contend, first, that the alleged parol agreement, if made, was the agreement of McBride, the agent, and not the defendant, and in support of such contention they cite *Shank v. Insurance Co.*, 4 App. Div. 516, 40 N. Y. Supp. 14. This case seems to be an authority in defendant's favor. The facts in that case were very similar to the facts in the case at bar. We have carefully considered the reasoning of the court in the case cited, and, with all due respect to that court, we are forced to the conclusion that the reasoning is unsound, and that it is opposed to the great weight of authority. The defendant is a foreign corporation, and can, of course, only act through an agent. The defendant concedes that the policy which was to be renewed under the terms of the parol agreement was the policy of the defendant, and that the same was issued by McBride as agent, with full authority to do so, and it seems unreasonable to suppose that the parties in making this parol agreement believed that they were dealing with McBride personally, instead of in his capacity as such agent. If the parol contract to

renew had been fulfilled by McBride, it would have been done as agent. Plaintiffs having dealt with McBride as agent in the issuance of the policy in the first instance, which policy expressly provided for renewals thereof from time to time, it is but natural to suppose that in subsequent dealings, relating to the renewal of this identical policy, the parties contemplated that they were dealing with him in the same capacity. McBride was not engaged in the issuance of insurance policies or the renewal thereof on his own account, but simply as agent. This all parties knew. McBride was authorized by the company to issue renewals of its policies, and we must hold, under the evidence in this case, that in entering into the preliminary contract to issue such renewal he acted in his representative capacity as agent. Upon this point, see *Commercial Union Assur. Co. v. State* (Ind. Sup.) 15 N. E. Rep. 518, and cases cited.

2. Appellant's second contention is that even if McBride, in making such parol agreement, acted in his capacity as such agent, still his authority as such agent for the defendant did not include the making of executory contracts by parol to renew policies in futuro. This, to our minds, is the most difficult question in the case, and, in order to intelligently dispose of the same, it is necessary to examine into the authority conferred upon Mr. McBride by this insurance company. The authority of an agent is such as is expressly given him by his principal, and, in addition thereto, such as his appointment and duties necessarily imply. The commission appointing McBride as agent gave him "full power to receive proposals for insurance against loss or damage by fire; to act as surveyor, or to appoint surveyors, of buildings to be insured, or containing property to be insured, in St. Thomas and vicinity; and insurance thereon to make, by policies signed by the president, and attested by the secretary, of said Aetna Insurance Company, and countersigned by the said William McBride, agent." The only other authority conferred upon McBride is such as is contained in the policy (Exhibit A), as follows: "In any matter relating to this insurance, no person, unless authorized in writing, shall be deemed the agent of this company. This policy may, by a renewal be continued under the original stipulation, in consideration of premium for the renewed term, provided that any increase of hazard must be made known to this company at the time of renewal or this policy shall be void. * * * This policy is made and accepted subject to the foregoing stipulation and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto; and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy, except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto; and, as to such provisions and conditions, no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto; nor shall any privilege or permission

affecting the insurance under this policy exist or be claimed by the insured, unless so written or attached." It appears from the agent's commission that he possessed express authority to receive proposals for insurance; to act as surveyor, and to appoint surveyors, for buildings to be insured; and insurance thereon to make, by policies signed by the president, and attested by the secretary, of said company, countersigned by said McBride, as agent; and, by the terms of the policy, the agent might renew the same in the manner therein provided. There is nothing in the commission or in the policy expressly authorizing McBride as agent, to make a preliminary oral agreement to issue or renew policies; neither is there anything restricting the authority of the agent in this regard; and, if such authority was conferred upon him, it must have been so conferred by operation of law, from the express authority given him. It is well settled in this country that the agent of a foreign insurance company, invested with such authority as was conferred upon McBride by this defendant, is a general agent. *Post v. Insurance Co.*, 43 Barb. 361; *Lightbody v. Insurance Co.*, 23 Wend. 22; *McEwen v. Insurance Co.*, 5 Hill, 105; *King v. Cox* (Ark.) 37 S. W. Rep. 877. It is also, we think, well settled that such agent, with similar authority, may enter into a binding executory contract by parol to issue or to renew a policy in the future. A leading authority involving this question is *Post v. Insurance Co.*, 43 Barb. 351. It was contended by the plaintiff in that case that the defendant, either itself or through its agent, made a verbal agreement to renew the policy in question for a period of 60 days, which included the time when the loss occurred; defendant's contention being that the evidence was too indefinite to establish an agreement to renew the policy, and that it could only be renewed by an instrument in writing, and that the agreement, if made, was not binding on the defendant; and the court, in disposing of the question here involved, said: "When this agreement was made, however, the policy had expired, and, as the agreement was unwritten, the defendant claims that it was not binding upon it. The court ruled otherwise, and the defendant excepted. No evidence other than the form of the policy, and of the certificates used in making the renewals, was given showing that the exercise of the agent's authority depended upon the manner in which he made the contracts of insurance. The policy and certificate declared that they should not be valid until countersigned by the agent. But that does not exclude his power to bind the defendant by the agreement in question. * * * The possession and use of the defendant's certificates of renewal, together with the exercise of that authority in other instances, indicate that the power of renewing and continuing insurances had been conferred upon this agent. There is nothing in the case showing him to be confined or restricted in the use of it to the cases where the policy renewed was still valid as an insurance. He was authorized to accept risks, to agree upon and settle the terms of their insurance, and to carry them into effect by issuing and renewing policies on

behalf of the defendant. * * * The agreement which, upon the evidence, the jury must have found existed in this case, did not, of itself, renew the insurance. But it imposed upon the defendant's agent the duty of doing whatever was necessary to effect a renewal of it. An agreement of that nature, either expressed or implied, must necessarily precede the renewal of any insurance, and a similar one is made to ascertain and determine the subject, terms, and rate of insurance in all cases where policies are issued. They are directly and necessarily within the employment and authority of the agent, whose business could not be carried on without the power to enter into them, and the law does not require them to be in writing in order to become obligatory on the parties. They have often been the subject of judicial controversies, and always held binding on the principal, when fairly established by proof." In *Commercial Mut. Marine Ins. Co. v. Union Mut. Ins. Co.*, 19 How. 321, 15 L. Ed. 636, it was held by the Supreme Court of the United States that, under the common law, a promise for a valuable consideration, to make a policy of insurance, is no more required to be in writing than a promise to execute and deliver a bond, a bill of exchange, or a negotiable note. The same doctrine was announced by the Court of Appeals of New York in *Trustees of First Baptist Church v. Brooklyn Fire Ins. Co.*, 19 N. Y. 305. In that case the court sustained the validity of the unwritten agreement to continue a policy of insurance from year to year until notice of the contrary should be given, notwithstanding the policy declared that it might be continued provided the premium therefor was paid and indorsed on the policy, or a receipt given for it, and that no insurance whatever, original or continued, should be considered binding until the actual payment of the premium. In *Ellis v. Insurance Co.*, 50 N. Y. 402, a similar question was involved, and the court said: "Whatever doubts may formerly have been entertained as to the validity of parol contracts of insurance made by insurance corporations, authorized by their charters to make insurance by issuing policies, it is now settled that they are valid. It is equally well settled that parol contracts of such companies to effect an insurance by issuing policies are valid, and will be enforced by compelling specific performance by the company, or in an action for the breach of the agreement; in either of which, a recovery for a loss of the property agreed to be insured will be awarded to the plaintiff." Again, in *Angell v. Insurance Co.*, 59 N. Y. 171, the Court of Appeals of New York said: "The counsel for the appellant is mistaken in supposing that the action was based upon a parol contract of insurance for three years. There was not sufficient evidence to show that Carpenter was authorized to make such a contract by the defendant. It was alleged in the complaint, and the testimony tends to prove, that a preliminary contract was made by which it was agreed that the defendant should insure the plaintiff upon the property against damage by fire, for a sum and at a rate agreed upon, for the term of three years from the time of making the

contract, and that a policy of insurance should shortly thereafter be made out to take effect from that time, and delivered to the plaintiff by Carpenter, at which time it was agreed that the premium should be paid. It was proved that Carpenter was the agent of the defendant, with authority to negotiate contracts of insurance in its behalf, agree upon the rate of premium, the term of the insurance, and, in short, to agree upon all the terms of the contract; that he was furnished with policies executed in blank by the president and secretary of the company, with authority to fill up and deliver the same to any party with whom he made a contract. This authorized him to make a preliminary contract, binding upon the defendant, to be consummated by filling up and delivering a policy pursuant thereto." See, also, *Van Loan v. Insurance Ass'n*, 90 N. Y. 280, where the same doctrine is reaffirmed by that court. That an insurance company can, by a preliminary parol contract, bind itself to issue or to renew a policy in the future, seems too well settled to admit of doubt. In addition to the foregoing, the following are a few of the many authorities sustaining this doctrine: *Stickley v. Insurance Co.* (S. C.) 16 S. E. Rep. 280; *Baubie v. Insurance Co.*, 2 Dill. 156, Fed. Cas. No. 1,111; *Cohen v. Insurance Co.*, (Tex. Sup.) 3 S. W. Rep. 296; *Taylor v. Insurance Co.*, 2 Dill. 282, Fed. Cas. No. 13,793; *King v. Cox* (Ark.) 37 S. W. Rep. 877; *Newark Mach. Co. v. Kenton Ins. Co.* (Ohio Sup.) 35 N. E. Rep. 1060, 22 L. R. A. 768; *Croft v. Insurance Co.* (W. Va.) 21 S. E. Rep. 854; *Hardwick v. Insurance Co.* (Or.) 26 Pac. Rep. 840; *More v. Insurance Co.* (N. Y. App.) 29 N. E. Rep. 757.

The learned counsel for appellant, in support of his position, cites numerous cases which we will briefly notice. The first case upon which he relies is *O'Reilly v. London Assurance*, 101 N. Y. 575, 5 N. E. Rep. 568. That case is distinguishable from the case at bar. Under the particular facts in that case, it was held, as a matter of law, that the parties did not contemplate that they were entering into a renewal agreement. Furthermore, under the express terms of the policy, a renewal could not be had without actual payment of the premium for the renewal term, and an indorsement thereof made upon the policy or a receipt given therefor, and it was expressly stipulated in the policy that the company should not be liable unless the premium for the renewal term was actually paid. In *Taylor v. Insurance Co.*, 47 Wis. 365, 2 N. W. Rep. 559, and 3 N. W. Rep. 584, cited by appellant, the action was based upon an alleged completed contract of insurance, and not upon the breach of an oral agreement to insure; and the court held that the parol negotiations did not amount to a complete contract of insurance in præsenti, and therefore that the action, which was based on the policy of insurance, could not be maintained. See *King v. Insurance Co.* (Wis.) 17 N. W. Rep. 297; *Campbell v. Insurance Co.* (Wis.) 40 N. W. Rep. 661. To the same effect was the case of *Idaho Forwarding Co. v. Fireman's Fund Ins. Co.*, 8 Utah, 41, 29 Pac. Rep. 826, 17 L. R. A. 586, cited by appellant. In the latter case

the court said: "The plaintiff relies upon a contract in præsentia, not a contract to thereafter insure." In *Stewart v. Insurance Co.*, 102 Cal. 218, 36 Pac. Rep. 410, also relied upon by the appellant, the agent had no authority, either actual or ostensible, to enter into a contract of insurance, and therefore this case cannot be considered in point. The last case relied upon is *Shank v. Insurance Co.*, 4 App. Div. 516, 40 N. Y. Supp. 14. This case we have already referred to, and we are constrained to hold that the language used in the opinion in this case, respecting the power of a general agent to enter into a valid parol contract to insure, is unsound, and opposed to the great weight of authority. It is contrary to the doctrine established in *Manchester v. Assurance Co.*, 151 N. Y. 88, 45 N. E. Rep. 381, as well as the other New York cases cited in this opinion.

But the learned counsel for the appellant contends that, under the provisions of the policy respecting renewals, waivers, etc., and under section 4608 of the Revised Codes, the agent was not authorized to bind the company by a parol contract to renew this policy. We are unable to agree with counsel on this point. We are of opinion that these provisions clearly have reference only to the contract of insurance and of renewal, and not to a preliminary agreement to insure or to renew. We are supported in this view by numerous authorities. *Baile v. Insurance Co.*, 73 Mo. 371; *Sanborn v. Insurance Co.*, 16 Gray 448; *Commercial Mut. Marine Ins. Co. v. Union Mut. Ins. Co.*, 19 How. 318, 15 L. Ed. 636; *City of Davenport v. Peoria Marine & Fire Ins. Co.*, 17 Iowa, 276; *Security Fire Ins. Co. v. Kentucky Marine & Fire Ins. Co.*, 7 Bush, 81; *Insurance Co. v. Colt*, 20 Wall. 560, 22 L. Ed. 423; *Insurance Co. v. Ryland* (Md.) 16 Atl. 109, 1 L. R. A. 548; *Emery v. Insurance Co.*, 138 Mass. 398, 412; *Insurance Co. v. Kelly*, 24 Ohio St. 345, 365; *Scranton Steel Co. v. Ward's Detroit & Lake Superior Line* (C. C.) 40 Fed. Rep. 866. Wood on Insurance (2d Ed. vol 1, § 11, announces the doctrine, as we think, correctly. He says: "Parol contracts to insure will be enforced in equity, even though the charter of the company requires all of its contracts to be in writing. The courts hold in such cases that there is a broad distinction between an executory contract and an executed contract, and that the charter provisions can only be held to apply to the latter; that is, that a contract of insurance must be in writing, but that a contract to insure may be by parol." It is also urged that prepayment of the premium for the renewal term was necessary to effect a valid renewal, but we are of the opinion that this was not essential. By the terms of the policy, prepayment of the premium is not required. By the language of the policy, it may be renewed "in consideration of premium for the renewal term." This language cannot be construed so as to require prepayment of such premium. Moreover, this language in the policy has reference only to the completed contract of renewal, and not to a preliminary contract to renew.

3. Appellant next urges that the trial court erred in permitting

plaintiffs to amend the complaint at the trial. The original complaint alleged, in substance, that in the month of November, 1896, for a consideration, the defendant agreed with the plaintiffs to renew and keep in force all expiring policies of insurance, etc. The amendment which was allowed at the trial further alleged a specific agreement entered into on December 5, 1896, to renew this policy. As to whether or not it was error to allow said amendment, it is unnecessary to decide, for the reason that the record discloses that the trial court, at the time of the allowance of such amendment, distinctly stated that, if the defendant was prejudiced thereby and was not prepared to proceed with the trial at that time, sufficient time would be given it to prepare for the trial, and that two days afterwards, when the case was called for trial, counsel for defendant announced his readiness to proceed to trial upon the pleadings as amended. Surely, the defendant cannot now be heard to object to such ruling. But, upon the question of the amendment being permissible, see *Croft v. Ins. Co* (W. Va.) 21 S. E. Rep. 854, 857.

4. Certain errors are assigned on the admission of evidence. We have examined the rulings complained of, and we do not find any prejudicial error. That evidence of custom on the part of McBride, the agent, to extend credit for premiums, was admissible, see *Ruggles v. Insurance Co.*, 114 N. Y. 415, 418, 21 N. E. Rep. 1000; *Church v. Insurance Co.*, 66 N. Y. 222, 225; *Potter v. Insurance Co.* (C. C.) 63 Fed. Rep. 384; *Insurance Co. v. Morris* (Ala.) 18 South. Rep. 34; *Newark Mach. Co. v. Kenton Ins. Co.* (Ohio Sup.) 35 N. E. Rep. 1060, 1064, 22 L. R. A. 768; *Cohen v. Ins. Co.* (Tex. Sup.) 3 S. W. Rep. 296. The testimony of James McCabe, to the effect that he relied upon the contract to renew, and that they would have procured other insurance had they not believed that the policy was renewed, was not, we think, prejudicial, under the circumstances, and could not have misled the jury.

5. The remaining assignments of error relate to the court's instructions to the jury. The court charged the jury that the action was "to recover damages for the breach of the contract to insure," and the learned counsel for appellant contend that, inasmuch as the action is to recover damages for the breach of a contract to renew the old policy, the instruction was misleading and prejudicial. We must overrule this contention. We cannot believe that the jury were misled by this instruction, especially in view of the fact that they were later in the charge distinctly instructed that, before they could find for the plaintiffs, they must find that an agreement to renew the old policy was made as alleged.

It is next urged that, in charging the jury as to the powers of an insurance agent, the trial court committed error. The instruction complained of was as follows: "An insurance agent, with power to make and effect insurance, and to issue and deliver policies, and to receive and collect premiums, has the power, if no restriction on it is shown and brought home to the knowledge of the person dealing with him, to bind his company by a verbal contract with

the assured, at or prior to the expiration of the policy, to renew the insurance, and to waive the payment of the premiums for the time being, and to give the assured time for such payment." We think the above instruction stated the law correctly. That McBride was authorized to solicit insurance, to issue, countersign, and deliver policies of insurance, to renew the same, and to collect premiums therefor, the undisputed evidence shows; and it follows therefrom, as a matter of law, that he possessed authority to make preliminary oral agreements to issue or to renew such policies. Upon this point, see authorities cited under the second proposition in this opinion; also *South Bend Toy Mfg. Co. v. Dakota Fire & Marine Ins. Co.* 3 S. D. 205, 52 N. W. Rep. 866.

Appellant also complains of the following instruction: "The tender of the premium by plaintiffs after the fire was sufficient, if you find that there was an agreement to renew the policy." We think this instruction stated the law correctly. The evidence of a tender was undisputed, and it is well settled that prepayment of premium is not a condition precedent to the validity of a parol agreement to insure or to renew. See authorities above cited.

Lastly, the instruction of the court as to the burden of proof is challenged as erroneous. The instruction told the jury that the plaintiffs must establish their case "by fair preponderance of the evidence." Counsel for appellant insists that the jury should have been told that the plaintiffs must establish their case by clear and satisfactory evidence. The rule contended for by appellant is not applicable to this case. We think the instruction given was correct. We are unable to see why a different rule should apply to a case of this kind than is applied to actions for damages for the breach of other parol contracts. This question was involved in the case of *Johnson v. Insurance Co.* (Ky.) 2 S. W. Rep. 151, and the court used the following language: "The latter kind of contract, usually existing in parol, must be established by the same class of proof required to establish any other contract. It must be shown that a complete contract was made, that an agreement to insure was in fact entered into, and that nothing essential to a complete agreement was left open for future determination. The burden is on the party attempting to establish such a contract to establish it by a preponderance of evidence." See, also, *Dodd v. Insurance Co.* (Or.) 28 Pac. Rep. 881, 884; *Dinning v. Insurance Co.*, 68 Ill. 414; Ostr. Ins. § 10; 4 Joyce, Ins. § 3760. Having decided each of appellant's assignments of error adversely to it, it follows that the order of the District Court denying a new trial should be affirmed.

YOUNG, J., having been of counsel in the case, took no part in the hearing; Judge Fisk, of the First Judicial District, sitting by request.

(81 N. W. Rep. 426.)

CATHARINE HEYROCK vs. WM. SURERUS, *et al.*

Opinion filed November 1, 1899.

Cancellation of Deed—Fraud.

The evidence in this case on the part of plaintiff is not of that satisfactory character that will warrant a court in setting aside a deed of real estate on the ground of fraud.

Appeal from District Court, Pembina County; *Pollock, J.*

Action by Catharine Heyrock against William Surerus and John D. Geiger. Judgment for plaintiff, and defendants appeal. Reversed.

Burke & Vick, for appellants.

W. J. Kneeshaw and *M. Brynjolfson*, for respondent.

BARTHOLOMEW, C. J. Plaintiff seeks to have a deed to a quarter section of land in Pembina county, which she executed and delivered to the defendant Surerus, set aside on the ground of the fraud of the purchaser at the time the contract was made. The plaintiff acquired the land under the pre-emption laws, prior to 1885. At that date she returned to Canada, leaving the land in charge of her brother, John Heyrock, with the understanding that he should proceed to put the same in a state of cultivation, pay the taxes, and hold the farm until the proceeds repaid him for his outlay. At that time there was but a small amount broken. The brother held the land until January, 1896, when it was purchased by the defendant Surerus at the plaintiff's home in Canada. It is alleged that defendant, to induce plaintiff to sell the land, falsely stated its value and its condition, and that John Heyrock had received enough out of the farm to repay him all of his outlay. The answer denies all fraud. There was a decree for plaintiff, and the defendants appeal. Defendant Geiger is a purchaser from Surerus. The case comes to this court for trial de novo on the testimony, and there is practically no question of law involved. Our conclusions from the testimony, which we have carefully considered, are directly opposed to those of the trial court.

Fraud will never be presumed. It must be shown by satisfactory evidence. This is elementary, and is specially true where a party seeks to avoid his own solemn and deliberate deed. Plaintiff fell far short of meeting these requirements. She did not make out a prima facie case. We are not warranted in reviewing the testimony at any length, but will notice a few points. Plaintiff testifies: "I had been dissatisfied with the sale, because my brother John had not got his pay out of it, and that was the only reason I bring this suit." But had defendant Surerus deceived her on that point? She swears: "I told him that I did not want my brother to lose anything if I sold the land. He said he had made his pay out of the land; that the use of the land was worth more than that; and

that he was well paid." But it is too obvious for discussion that defendant's statement was simply an opinion. He did not know, or pretend to know, what the brother had expended or received. He simply gave his opinion that the use of the farm for the years must have repaid the expenditure,—a matter of which plaintiff might be as competent to judge as defendant, and upon which she had ample opportunity to inform herself. No fraud can be predicated upon any such statements. *Heald v. Yumisko*, 7 N. D. 422, 75 N. W. Rep. 806, and cases cited. Again, on the question of value. The purchase price was \$950. The defendant Surerus represented that as a fair price for the land. But the deal was not made on his representations alone. Plaintiff's brother John, less than two months before, had written to her desiring to purchase the farm, and offered to pay \$700 therefor. Further, plaintiff's evidence shows that one Reckbiel, a former resident of North Dakota, and well acquainted with the land, was then living near plaintiff in Canada. Plaintiff's brother William, with whom she lived, interviewed Mr. Reckbiel on the subject before the deed was given, and he reported that plaintiff was getting a good bargain. Further, her evidence shows that when the bargain was closed Surerus returned to his home in Pembina county without a deed; that he had the deed prepared then, and sent it to Canada; that John Heyrock saw him, and objected to his buying the land; that he told John to telegraph to his sister not to sign the deed; that John did so telegraph, and his dispatch was received before the deed was signed; that thereupon the members of the family in Canada consulted over the matter, and plaintiff signed and forwarded the deed. During all the years John Heyrock had held the land plaintiff had received nothing therefrom. She was anxious to sell. It was fully three weeks from the time the negotiations began until the deal was closed by the delivery of the deed. She had ample time and opportunity to inform herself. Following the weak case made by plaintiff, was the evidence of defendants and their witnesses, wherein all fraud and false statements were expressly denied, and the evidence tended strongly to show that every statement made by defendant Surerus concerning the condition of the land and its value, and as to John Heyrock having received enough from the farm to repay his outlay thereon, was substantially true. The evidence will be searched in vain for proof that defendant Surerus made any statement, for the purpose of inducing plaintiff to sell the land, that he knew, or had good reason to believe, was false. Under these circumstances, plaintiff cannot be permitted to avoid her deed. The District court will vacate its decree, and enter judgment dismissing the complaint, with costs of both courts in favor of appellants.

Reversed.

WALLIN, J., concurs.

YOUNG, J., having been of counsel, did not sit in the case or participate in the decision.

(81 N. W. Rep. 36.)

WILKIN W. FEGAN *vs.* THE GREAT NORTHERN RAILWAY COMPANY.

Opinion filed November 3, 1899.

Payment By Mistake—Negligence.

In an action to recover money paid under a mutual mistake of fact, where it appears that the plaintiff prior to and at the time of paying over the money had in his hands the present means of ascertaining whether or not the fact in question existed, but negligently omitted to make the investigation, which, if made, would have discovered the fact in question, and where the further fact appears that on account of such negligence of the plaintiff the defendant lost a valuable right, and that the defendant cannot be placed in statu quo, the plaintiff cannot recover.

Negligent Failure to Examine Account—Money Paid Under Mistake of Fact—Estoppel.

In such actions the plaintiff cannot recover when, in equity and good conscience, he ought not to recover. Applying these rules of law to the facts stated in the opinion in this case, it is *held* that the judgment of the District Court dismissing the action was properly entered, and must be affirmed.

Appeal from District Court, Grand Forks County; *Glaspell, J.*
Action by Wilkin W. Fegan against the Great Northern Railway company. Judgment for defendant, and plaintiff appeals.
Affirmed.

Bosard & Bosard, for appellant.

A payment made under belief of a liability, which did not exist in fact, is not voluntary, and the money may be recovered back, though the mistake might have been avoided if greater care had been taken to investigate and ascertain the facts regarding the transaction. *United States v. Barlow*, 132 U. S. 271-282; *Brown v. Tillinghast*, 84 Fed. Rep. 71; *Whcadon v. Olds*, 20 Wend. 174; *Clark v. Sylvester*, 13 Atl. Rep. 404; *United States v. Bank*, 39 Fed. Rep. 359; *Holmes v. Lucas Co.* 53. Ia. 211; *National Life Ins. Co. v. Jones*, 59 N. Y. 649; *Fraker v. Little*, 36 Am. Rep. 262.

W. E. Dodge, for respondent.

The payment by plaintiff was a voluntary one in settlement of a bona fide claim arising out of plaintiff's misconduct and the misconduct of his agent Stewart. It was made with full knowledge of the facts or the means of ascertaining them by consulting records in his possession. Plaintiff has profited by such payment and by his negligence has made it impossible to place defendant in a position of statu quo. *Espy v. First Nat. Bank*, 18 Wall. 604; *Boas v. Updegrave*, 5 Pa. St. 516, 47 Am. Dec. 425; *Smith v. Schroeder*, 15 Minn. 18; *Morton v. Marden*, 15 Me. 45, 32 Am. Dec. 132; *Welch v. Carter*, 1 Wend. 185; *Mowatt v. Wright*, 1 Wend. 355; *Bilbie v. Lumley*, 2 East. 470; *McArthur v. Luce*, 5 N. W. Rep. 355; *Robinson v. Charleston*, 45 Am. Dec. 739. The same rule obtains in tax cases. *Cooley on Tax'n*, 2d Ed. 476,

553; 2 *Desty Tax'n*, 850; *Lynde v. Melrose*, 10 Allen 49; *Brevort v. Brooklyn*, 89 N. Y. 135; *Waples v. United States*, 110 U. S. 630; *Flint v. Comm'srs*, 27 Fed. Rep. 850; *Tyler v. Cass Co.* 1 N. D. 369; *Detroit Advertiser v. Detroit*, 5 N. W. Rep. 72; *County of Wayne v. Randall*, 5 N. W. Rep. 75.

WALLIN, J. This action was tried in the District Court without a jury, and judgment was entered in that court dismissing the action. None of the findings of fact are challenged in this court, but the appellant claims here that the conclusions of law and the judgment are unwarranted by the facts as found. It appears that this action is for money had and received, and is brought to recover \$904.83, with interest after July 1, 1895, which principal sum plaintiff claims was paid by him to the defendant under a mistake of fact. The fact of such payment is not in dispute, and the findings show that the same was made under the following circumstances: On November 1, 1894, the plaintiff became the station agent of the defendant at its station at Grand Forks, N. D., and on that day took charge of said station, and the property and business appertaining thereto. When plaintiff was installed as station agent, and long prior thereto, one Daniel S. Stewart had been in the employ of the defendant at said station as cashier of the station, and plaintiff continued Stewart in that capacity. It appears that said station, when plaintiff was installed, was short in its accounts with the defendant, and when plaintiff assumed charge certain waybills and other items of account were suppressed, and did not appear in the transfer of the station to the plaintiff. The sum total of the suppressed accounts exceeded the sum of \$5,000. Later, and prior to July 1, 1895, these suppressed waybills and accounts were by said Daniel S. Stewart, and without plaintiff's actual knowledge, brought into the accounts of said station, whereby it appeared that the funds of the defendant had been misappropriated and diverted from the defendant while plaintiff had been in charge of the station. It appears that on or about the date last named the defendant represented to the plaintiff the fact that he was short in his accounts with defendant, and represented to plaintiff that said Stewart had, since the plaintiff had assumed charge of said station, collected moneys belonging to the defendant, and misappropriated the same, and diverted them to other purposes than payment to the defendant, to an amount exceeding \$2,900. The trial court found as follows:

"For the protection of the defendant against the misappropriation of moneys at said station the said defendant had caused the plaintiff herein to be bonded in a company organized and operated for such purpose in the sum of four thousand (\$4,000.00), and had, on or about the 1st day of October, 1894, caused the said Daniel S. Stewart to be also bonded in said company in the sum of two thousand (\$2,000.00) dollars. It is the practice and custom of the defendant, when a loss is covered by the bonds of two or more employes, to proceed against the bond securing the larger sum,

and thereupon the defendant notified and informed the plaintiff herein that unless the said moneys which had been so misappropriated were replaced and repaid to the defendant at once, that the defendant would proceed upon the bond of the said Fegan for indemnity on account of the said loss; and the said defendant also at the same time advised the plaintiff that they could not proceed upon the bond of the said Stewart, as the amount of the loss was greater than the amount for which the said Stewart was bonded, but, if the said Fegan would pay the overplus, or the amount of the said damage in excess of the amount for which the said Stewart was bonded, to-wit, the amount of nine hundred four and 83-100 dollars (\$904.83), then, and in that case, the defendant would not proceed upon the bond given for the plaintiff, but would proceed upon the bond given for the said Stewart. At that time the plaintiff herein believed that the said moneys were so misappropriated and diverted during the term of the plaintiff's agency at the said station aforesaid, and while said station was under his direction and control, and that he was liable therefor; and the said Great Northern Railway Company also believed at that time that the said misappropriation had occurred during the plaintiff's term, and that he was liable to them for said amount; and in such belief the plaintiff, on or about the 31st day of July, 1895, paid to the defendant the said sum of nine hundred four and 83-100 dollars (\$904.83); and the said defendant, so believing that the said plaintiff was liable for the payment of the said sum, received from the plaintiff the said sum of nine hundred four and 83-100 dollars (\$904.83).

* * * The said shortage and misappropriation of funds of the said defendant had, in fact, occurred before the 1st day of November, 1894, and long before the plaintiff had been appointed agent of said company at said station; but the plaintiff did not know such fact until long after the payment of said money, and as soon as he was notified of the fact that the said misappropriation of said moneys had occurred before the 1st of November, 1894, and that he was not liable therefor, he immediately demanded from the defendant repayment of said sum of eight hundred and eight and 26-100 (\$808.26) dollars, being the balance of said nine hundred four and 83-100 (\$904.83) dollars, the sum paid by him, after allowing the credit of ninety-six and 57-100 (96.57) dollars; but the defendant has refused to pay the same. All the moneys collected at said station during the term the plaintiff was agent at said station, and all the property that was received at said station during the time the plaintiff was the agent thereof, have been fully accounted for and paid over to the said defendant, and the said plaintiff was not indebted to the said defendant on the said 31st day of July, 1895, in the said sum of nine hundred four and 83-100 (\$904.83) dollars, or in any other sum whatever. * * *

"The duties of the plaintiff, as such agent, were to exercise (subject to the supervision and direction of his principal) exclusive control and supervision over defendant's business at Grand Forks

station, but plaintiff could not and was not expected to perform all labor in the conduct of the business of the station personally, or to personally verify every item of business. He was, under the rules of the company, of which he had due notice and knowledge, responsible for all business transacted by the defendant as such agent. The defendant knew, officially, no other employe at said station. There were printed and written rules promulgated by the defendant, of which the plaintiff had due notice and knowledge at all times during his employment, which, in addition to the general custom of doing business, regulated his conduct. These rules have been in force since 1891, and are still in force. Rule 36 provides as follows: 'No agent is authorized to give credit; charges are invariably payable on delivery; and agents will in no case deliver freight until receipted for by the consignee, or his agent, nor deliver part of a consignment without first collecting charges on the whole.' * * * Rule 37 provides as follows: 'Agents will be held responsible for the safe-keeping of freight received by them, and for all charges thereon.' Another rule, duly proven by defendant, provides as follows: 'Remit Daily. Keep no money on hand excepting working fund. Remit the exact amount in excess of working fund provided in advance. Before taking credit on your cash book for remittances, you are required to have the amount definitely ascertained and inclosed in a proper envelope, sealed, and then make your cash-book entry, and forward the remittance by first express. Daily and monthly balance sheets must show the amount remitted to the treasurer and any bank; also the date of the remittance.' The term 'working fund' referred to a certain amount of money kept on hand for making change. The plaintiff, as agent, was required in every instance to ascertain the exact amount due the company, and then remit it, and these facts could be ascertained by every agent, including the plaintiff. The plaintiff was required at the end of every month, before he signed his balance sheet, to see that it was correct, and then sign it personally; to see that the freight receipt book corresponded with the abstract; to check the remittance as shown by the express receipt book against the items shown on the balance sheet; to see that they were properly made. These items were listed in detail, and showed the balance of account. The plaintiff was required, and it was his duty, to see that the uncollected list was correct. In order to check up his uncollected list, he was required to ascertain what cars were in the yard, and see that they corresponded with the uncollected list. It was his duty to ascertain that fact, and see that the business of the station was properly conducted; and from the records in his office it was possible for him to ascertain to a certainty the cash actually received at the end of each month. It was possible and practicable for the plaintiff, within eight days after he entered upon his duties, and at all times thereafter during his term of office, to ascertain

from the records in his office whether there had been any defalcation on the part of his cashier before November 1, 1894, or at any time thereafter, by verifying his uncollected list. If he had checked up his accounts, as required by the customs and rules of the company, he could and would have ascertained the fact at the time when it occurred. Each agent at every station was required to make a waybill for each car, stating where it was destined, to whom consigned, and the rate of charges. The auditing department of the defendant had the same opportunity of discovering any shortage as had the plaintiff, and it was more particularly the duty of said department to do so; that being the object and province of said department. Defendant's accounts with its agents were not always closed on the last day of the month, but held usually two days, to take in waybills due in the current month, so as to keep the transient as small as possible. Plaintiff could at all times, when he made his monthly reports have ascertained whether or not the amount due for freight according to his records had been collected, by making an inquiry of the consignees. The car records at his station would have shown whether or not the car had been emptied and sent away. This was part of the plaintiff's duty. He should have ascertained and reported, and his car record should have shown, these facts in every instance. These car records, as far as the freight and traffic department was concerned, were kept by the plaintiff exclusively at his station, and the plaintiff was required to report every car received, when empty, and when removed from their station, and keep a written record thereof at his station. It was his duty to know when cars came in, when they departed, and make a record, and report to the defendant any and all money collected for freight received at his station. Any money not remitted should have been in his possession. The station agent's reports were the only means by which the defendant could or did receive this information. The cashier, Mr. Stewart, was in every respect the servant of the plaintiff, who had authority to employ, superintend, direct, and discharge him, or any cashier at his station, at will; and such cashiers acted under the exclusive supervision and control of the agents at whose stations they served. Such cashiers only had access to the books, records, and papers of the defendant by permission of the agent, and never to the exclusion of the agent. Such matters were left entirely to the discretion of the agent.

"The defendant had a traveling auditor, whose duty it was exclusively to check up the accounts of defendant's station agents, including those of the plaintiff, but he was not requested, directed or required to investigate as to whether or not bills had in fact been paid by the consignees. He was governed by the records kept by the station agents only so far as they go. They are not conclusive. His duty is to thoroughly check the station up, and to find its true condition, and it was the duty of the station agents to ascertain the facts as to whether or not such collections had been made, and the money remitted. All of the station agents, including

the defendant's agent at Grand Forks (the plaintiff), were bonded by the Guaranty Company of North America to indemnify the defendant for any damage which it might sustain by reason of their negligence, mistakes, or defalcation. Such bond covered all agents who were held responsible to the defendant for all business transactions at their several stations. Since the date of said Stewart's employment as cashier at said Grand Forks station, prior to November 1, 1894, and the date of his discharge, June 1, 1895, moneys were received at said Grand Forks station on account of freight charges, which were never properly accounted for to the defendant, in divers sums, aggregating \$2,904.83. The embezzlement of these funds was accomplished as follows: Bills against consignees were rendered at said station, and were duly collected, after which the same were reported to the defendant upon the monthly balance sheet as 'uncollected,' and the amounts so collected were not remitted to the defendant or its treasurer, as required by the customs and rules of the company, or otherwise, except as hereinafter stated. This practice continued from month to month. A portion of the money collected each month was remitted by the agent at said station as having been collected in payment of uncollected freight bills for the previous month, when in truth and in fact said alleged uncollected bills had been collected, and the money received by said agent or his cashier, and the amounts so received were held from defendant, and not remitted to it. The October balance sheet, made and certified to by plaintiff as agent at Grand Forks station on November 8, 1894, shows items aggregating \$1,049.65 as having been collected after November 1, 1894, while in truth and in fact all said moneys had been collected and received by the said Stewart prior to November, 1894. The same items appeared on the balance sheet for the preceding month as 'uncollected,' while in truth and in fact the amounts had been collected. The plaintiff might have ascertained these facts from an inspection of the station records, or on inquiry from the consignee subsequent to making his October balance sheet, and under the rules of the company he was required to do so; but it was particularly the duty of the traveling auditor to have discovered this shortage at or about the time Mr. Fegan was checked into the Grand Forks station. The plaintiff's attention was called to this and other irregularities in his accounts in February, 1895, by letter written and addressed to him by the auditor of freight receipts, an officer of the defendant, and plaintiff's superior officer: whereupon plaintiff acknowledged such irregularities, and promised to discharge his cashier, Stewart. On February 28, 1895, plaintiff wrote his superior officer, Mr. F. E. Draper, auditor of freight receipts for the defendant, as follows: 'I do not like the way things have been running here in holding waybills, and am going to break it up.' He did not, however, change his cashier (Stewart), and he was not discharged until about June 1, 1895. And on March 17, 1895, plaintiff wrote his superior officer, said auditor of freight receipts, as follows: 'A few days ago I wrote you that

I would change cashiers on the first inst. I have changed my mind, and will keep Mr. Stewart.' Plaintiff was advised and had knowledge of irregularities in the conduct of said station in February, 1895, but not of any embezzlement of money of defendant. The evidence does not show that he knew the aggregate amount or number of items of collected freight reported as uncollected, but it does show conclusively that he might easily have ascertained these facts had he complied with the rules of the defendant, and made investigation, as hereinbefore described, and as conclusively that the defendant had the same opportunity. Had the plaintiff, in compliance with the rules of the company, and his duties in the premises, ascertained and reported these facts at any time within six months after November 1, 1894, the defendant might have reimbursed itself for that portion of the defalcation embezzled prior to July 1, 1894, upon the bond of the predecessor of the plaintiff, who was the agent of the defendant prior to November 1, 1894, and who was also bonded for a similar amount in the Guaranty Company of North America, but after the expiration of said six months after November 1, 1894, it became impossible for the defendant to do so by reason of the limitation of said bond. So, also, had the defendant's traveling auditor properly discharged his duty in checking plaintiff into the Grand Forks station. A large sum of money, amounting to more than \$1,000, was collected by the plaintiff or his said cashier at said Grand Forks station after November 1, 1894, and remitted to the defendant as for collections made prior to November 1, 1894, while the several bills so collected were afterwards reported by the plaintiff on his monthly balance sheet to the defendant as 'uncollected freight bills.' These facts the plaintiff might have ascertained had he seen fit to examine the records in his custody, check up the freight bills, and ascertain from consignee whether or not the same had been paid, as hereinbefore recited, and it was the province and duty of defendant's auditing department to discover these irregularities. Defendant's 'auditor of freight receipts,' Mr. F. E. Draper, requested the plaintiff to make the accounts good at his station by adjustment in the same manner as all other agents of the defendant, stating that plaintiff would be held responsible for the shortages. The plaintiff inquired of said Draper how he should proceed. Mr. Draper informed him that, in case the account was not made good, the company would make the collection on the bond of the plaintiff, because its agents were bonded for the correct workings of the stations. Plaintiff then inquired and requested the defendant to make collection from the Guaranty Company under the bond of his cashier, Mr. Stewart, as far as it would cover the same. Mr. Draper informed him that the company would be glad to do that. The plaintiff then inquired if he thought the Guaranty company would remain on his bond if such action was taken, whereupon Mr. Draper informed him that he did not know. The matter then remained in abeyance, after which

the plaintiff remitted to the defendant the sum of \$904.83, being the difference between said sum of \$2,904.83, the aggregate amount of said defalcation, and the sum of \$2,000, collected from the Guaranty Company under the bond of said Stewart. This payment was made in compliance with the voluntary request of the plaintiff that settlement and final determination of that matter be made in that manner, and was in all respects according to the election of the plaintiff, and in accordance with his supposed legal liability, and to protect his character and credit, after the receipt of numerous letters from Mr. Draper requesting the payment. The plaintiff stated to Mr. Draper, defendant's auditor of freight receipts, that it would be a reflection upon his record to have the demand made under his bond, which reflection he wished to avoid, and he himself requested that the adjustment be made in the manner in which it was, under which arrangement said sum of money was paid by the plaintiff to the defendant."

We have, despite their prolixity, set out the principal facts as found by the trial court with great fullness of detail, to the end that the grounds upon which we rest our decision may be fully and distinctly indicated in the opinion. As a conclusion of law the trial court found as follows: "The plaintiff is estopped by his own negligence from claiming that the money paid the defendant, as alleged in his complaint, was so paid under a mistake of fact. He might, without difficulty, have ascertained the true facts before making payment, and he permitted an unreasonable period of time to elapse after he could have discovered the facts, so that the position and legal rights of defendant have been altered, making it impossible that the parties can be placed in '*statu quo*.'" It is our opinion that this conclusion of the trial court is sound in law, and is fully warranted by the facts of the case. Appellant's counsel lay stress upon the fact that it appears that all money and property which came into the hands of the plaintiff as such station agent was accounted for and paid over to the defendant. Upon this finding counsel argue that the plaintiff could not have been prosecuted criminally for the embezzlement of any money or property so paid over and accounted for. If this were conceded,—and we think it should be, under the circumstances of this case,—it by no means follows that plaintiff can recover of the defendant the money sued for, which was voluntarily paid over to extinguish a bona fide claim which the defendant then had, and one arising out of the business transacted at Grand Forks station. Under the findings both the plaintiff and the defendant labored under the belief that the defalcation, which existed in fact, originated during the plaintiff's incumbency, and under such mutual belief the money sued for was paid over, and was so paid at the special instance of the plaintiff, and in furtherance of a plan of adjustment that plaintiff suggested, and which plan was adopted. The findings bring out the fact that the plaintiff, while in charge of the defendant's station, acting through Stewart, his servant and cashier, repeatedly

made collections of moneys due the defendant on current bills, and thereafter reported that such collections had not been made. The funds derived from such collections were, it is true, transmitted to the defendant, but in so doing a false report would be made to the defendant to the effect that the money so sent was derived from old and past-due collections and freight bills. These false and misleading reports, while fabricated by the cashier as a means of covering up his original embezzlements, were nevertheless the reports of the plaintiff. He is responsible to the company for their accuracy and truthfulness, and he is also responsible for any damages to the defendant resulting from such false reports. The findings are replete with the thought that it would have been not only possible, but practicable, and comparatively easy, for the plaintiff, within a few days after assuming his duties as station agent, and at all times thereafter during his term, to ascertain from the records in his office, and other sources of information to him accessible, whether there had been any defalcations on the part of his cashier, occurring before November 1, 1894, or at any time thereafter. The weakness of the plaintiff's case arises chiefly from his gross neglect in the matter of personally investigating the collections in his charge as station agent, and especially his neglect to personally examine and understand the reports made to the defendant, which were gotten up by his cashier, and for the accuracy of which he was responsible to the defendant. While it was not expected that the plaintiff would personally attend to all details appertaining to collections from consignees, or to the reports thereon required to be made to the defendant, he was, nevertheless, personally bound to account to the defendant, not only for all the collections actually made, but equally for the truthfulness of the reports sent in to the defendant of such collections. The findings show that either the plaintiff or his cashier, after November 1, 1894, collected over \$1,000 of current collections, and remitted the same to defendant, but falsely reported to the defendant that said collections were made upon accounts due prior to November 1, 1894. The practical result of sending in these false and misleading reports is succinctly stated by the court below as follows: "Had the plaintiff, in compliance with the rules of the company, and his duties in the premises, ascertained and reported these facts at any time with six months after November 1, 1894, the defendant might have reimbursed itself for that portion of the defalcation embezzled prior to November 1, 1894, upon the bond of the predecessor of the plaintiff, who was the agent of the defendant prior to November 1, 1894, and who was also bonded for a similar amount in the Guaranty Company of North America; but after the expiration of said six months after November 1, 1894, it became impossible for the defendant to do so by reason of the limitation of said bond." From this finding it is clear that the defendant, on account of the gross negligence of the plaintiff in the matter of his said collections and reports, actually lost a valuable legal right, viz: that of indemnity on the bond

of plaintiff's predecessor for defalcations which occurred at said station prior to the period of plaintiff's term as such station agent. At the time the plaintiff paid over to the defendant the money he is here seeking to recover, there was an existing loss, resulting from a defalcation at said station. It was inevitable that some one should bear the burden of the loss. Assuming that plaintiff was equally innocent with the defendant, and that he paid the money over under the mistaken idea that the defalcation occurred during his own administration, the fact remains that no loss whatever would have resulted to the defendant or to the plaintiff but for the plaintiff's own negligence in the premises. Under such circumstances, money paid under a mistake of fact cannot be recovered. At and long prior to the time of paying over the money the plaintiff had the means in his own hands of ascertaining all the facts concerning the defalcations and concerning the various reports bearing upon the subject-matter of the collections. He neglected to make the necessary investigation, and paid over the money without doing so. This negligence will defeat a recovery, inasmuch as the parties cannot be placed in *statu quo*. See *Espy v. Bank*, 18 Wall. 604, 21 L. Ed. 947; *Boas v. Updegrove*, 5 Pa. St. 516; *Norton v. Marden*, 15 Me. 45; *McArthur v. Luce* (Mich.) 5 N. W. Rep. 451. As has been seen, the defendant, on account of the plaintiff's gross negligence and dereliction of duty, has been caused to lose its right to indemnify itself upon the bond of the former station agent. Under such circumstances we would regard it as a violation of the principles of natural justice to permit the plaintiff to recover. The defendant cannot be placed in *statu quo*. The principles laid down by this court in the cases cited below are, in our judgment, in point: *Bank v. Laughlin*, 4 N. D. 391 (opinion, pp. 404, 405), 61 N. W. Rep. 473; *Krump v. Bank*, 8 N. D. 75, 76 N. W. Rep. 995. The contention of the appellant's counsel that the defendant's auditor was derelict also, and that he should have discovered the irregularities in plaintiff's collections and reports, cannot, in our opinion, alter the fact of the plaintiff's primary responsibility to the defendant for his own long-continued neglect and its consequences. The defendant and its auditor were entitled to receive true reports from the plaintiff, inasmuch as such reports were the defendant's proper sources of information touching the business done by the plaintiff as station agent for the defendant.

We have examined the cases cited by appellant's counsel, and have carefully considered that of *Supreme Council Catholic Knights of America v. Fidelity & Casualty Co. of New York*, 11 C. C. A. 96, 63 Fed. Rep. 56, and consider it, as well as the other cases of appellant, not in point. That case was not a case to recover money paid under an alleged mistake of fact, and it is devoid of the element of the plaintiff's gross neglect resulting in defendant's loss of indemnity,—an element which is controlling of the case at bar. Upon the facts found and the law applicable thereto as laid down

in the cases cited, we shall be compelled to affirm the judgment below. All the judges concurring.

(81 N. W. Rep. 39.)

PLANO MANUFACTURING COMPANY vs. EDWARD J. STOKKE.

Opinion filed November 4, 1899.

Justices of the Peace—Jurisdiction.

This action arose in a Justice's Court. On the return day named in the summons the case was called, and the defendant appeared in the action by counsel. Plaintiff did not appear upon the return day within the hour allowed for that purpose, or at all. After the expiration of such hour, defendant moved to dismiss the action upon the ground of plaintiff's default and nonappearance. The justice, without ruling upon said motion, adjourned the case upon his own motion. *Held*, that the action of the justice was error. The motion to dismiss should have been granted, under the provisions of section 6705, Rev. Codes. *Held*, further, that all further proceedings had in the action before the justice, after said motion was made, were illegal and without jurisdiction.

Appeal from District Court, Cavalier County; *Sauter, J.*

Action by the Plano Manufacturing Company against Edward J. Stokke, known as Edward Johnson. Judgment for defendant, and plaintiff appeals.

Affirmed.

J. C. Monnet, for appellant.

H. B. Doughty, for respondent.

WALLIN, J. This action was instituted in a Justice's Court, and judgment was rendered in favor of the plaintiff by that court. From such judgment the defendant appealed to the District Court upon question of law alone, and the District Court, after hearing counsel, entered a judgment dismissing the action without prejudice, and for the defendant's costs. From the judgment of the District Court the plaintiff has appealed to this court.

In disposing of the case, we shall have occasion to refer only to certain of its features. The summons required the defendant to appear before the justice on the 24th day of December, 1897, at 6 o'clock p. m. The docket of the justice shows that his court opened for this case at 6 p. m. on December 24, 1897, and that the defendant appeared by counsel, and after moving to quash the summons upon certain grounds, not now necessary to consider, moved to dismiss the action. The grounds of the motion to dismiss the action, as narrated by the justice in his docket, are as follows: "That no one has appeared in this court, representing the plaintiffs, either by attorney or agent, the time being seven o'clock and seventeen minutes, as appears by standard time, as appears now before this court; and no complaint having been filed, nor any evidence of

indebtedness from the defendant to the plaintiffs," etc. The docket record kept by the justice fails to disclose whether or not a ruling was made on defendant's motion to dismiss. The motion was, however, not granted, and was, in effect, denied, as appears by the entry in the docket next following the motion to dismiss, which is as follows: "Upon the court's own motion, court adjourned until Tuesday, December 28, 1897, at 3 o'clock p. m; the court being otherwise engaged." The next recital in the docket is as follows: "December 28, 1897, at 3 o'clock p. m., court opened. The plaintiff in court by its attorney, J. C. Monnet. The defendant in court by his attorney, H. B. Doughty, who appears specially, and moves to dismiss the action upon the grounds that the court has no jurisdiction. Overruled, and takes exception. Defendant's attorney takes no further part in the case." The docket further shows that the plaintiff then put in its evidence and rested its case, and that no evidence was offered by the defendant. Judgment for the amount claimed was entered in favor of the plaintiff, including costs.

In the notice of appeal to the District Court, it was stated as follows: "That the said appeal is taken upon questions of law arising upon the face of the docket of the said justice of the peace, specifications of which are hereto attached, marked 'Exhibit A,' and made a part of this notice." All the specifications of alleged error, as embodied in Exhibit A, need not be set out. The second specification is in the following language: "That no one has appeared in this court, representing the plaintiff, either by attorney or agent, the time being seven o'clock and seventeen minutes, as appears by standard time, as appears now before the court; and no complaint having been filed, nor any evidence of indebtedness from the defendant to the plaintiff." This specification quotes the language recited in the justice's docket as above narrated, and thus specifically calls attention to the action taken by the justice with respect to the defendant's motion to dismiss the action upon the particular ground stated in this specification. This specification is not challenged as insufficient, and the same is clearly sufficient, under section 1, chapter 7 Laws 1897. The question presented upon this specification of error is whether the justice erred in not granting defendant's motion to dismiss. We are clear that such nonaction was error. This point, in our opinion is governed by statutory provisions which are explicit. Section 6645, Rev. Codes, reads: "The parties are entitled to one hour in which to appear after the time stated in the summons, or any time fixed for further proceedings in the action, and neither party is bound to wait longer for the other." In this case but one party appeared within the hour, viz: the defendant, and this brings the case within the next section (6646), which declares that "if only one or more of the parties appear the case shall not be called until the expiration of the hour." The plaintiff being in default for appearance, and the hour allowed by statute for his appearance having expired, and the court being then in session for the purposes of the action, the defendant, under section 6645, was not "bound to wait

longer." He was therefore in such a position with reference to the action that he could avail himself of the provisions of another section of the Code (section 6705), which is as follows: "Judgment that the action be dismissed without prejudice to another action may be entered with costs to the defendant in the following cases: 2nd. When he (plaintiff) fails to appear at the time specified in the summons or to which the action has been postponed, or within one hour thereafter." As has been seen, the defendant took advantage of his position, and of the plaintiff's default to move, under section 6705, for a judgment of dismissal. He was manifestly entitled to have his motion acted upon and granted then and there. The justice, however, saw fit, of his own motion, to adjourn the case for four days. This matter of the adjournment was, in itself considered, clearly unwarranted by any provision of law. See section 6648, Rev. Codes. But the original error is sufficient to defeat the jurisdiction and invalidate the judgment. All proceedings before the justice, had after the motion to dismiss was made, were wholly without authority of law, and hence voidable by and appeal upon questions of law. Defendant did much more than was necessary to preserve his rights when he appeared upon the adjourn day, and, after entering a special appearance before the justice on that day, moved to dismiss the action upon the ground "that the court had no jurisdiction." This motion being denied, the defendant took "no further part in the case." Hence the record negatives the idea of any consent by defendant to the further proceedings which were had in the action before the justice. Counsel for the plaintiff contends that, where a plaintiff wholly fails to make an appearance on the return day named in the summons, he may nevertheless keep the action alive if he appears within the hour on the adjourned day, in cases where the justice adjourns the case upon his own motion. But the preliminary question is, where the hour named in the summons has elapsed, and the plaintiff has not appeared, whether the defendant, being present, may demand that the action be dismissed on the ground of plaintiff's nonappearance. This question is answered in the affirmative by the very terms of section 6705, supra. It follows, of course, in such cases, that, after the motion to dismiss is made, no adjournment upon any ground or for any reason is legally possible, and consequently there can be no legal adjourned day upon which either party, without the consent of the other, can appear in the action. After such a motion is made, the power of the justice in the action ceases, except for the single purpose of granting the motion and dismissing the action, with costs. Sections 6645, 6705, Rev. Codes, are in harmony with each other and both clearly show that the plaintiff is given an hour for appearance, both on the return day named in the summons and on any adjourned day; but no statute can be found which denies to the defendant the right to move for a dismissal of the action in a case where the plaintiff defaults, and does not appear within the hour upon the day named in the summons, or at any time on said day. This is an absolute

statutory right, and one not abridged by any other statute. This right was denied the defendant in this case, and the justice thereby lost his jurisdiction to proceed further in the action. The judgment of the District Court dismissing the action was therefore properly entered, and hence will be affirmed. All the judges concurring.
(81 N. W. Rep. 70.)

CARRIE E. LOCKREN *vs.* HELGE O. RUSTAN.

Opinion filed November 6, 1899.

Voluntary Transfer in Fraud of Creditors—Trusts.

Where the owner of real estate conveys the same to another party with intent to hinder, delay, or defraud his creditors, and for no consideration except the promise of such party to reconvey to the grantor on request, the transaction creates no trust relation between the parties thereto. Such fraudulent grantee may retain the legal and equitable title to the property as against all the world except the creditors of the grantor.

Moral Consideration will Support Transfer.

But, under such circumstances, a moral obligation of a high character rests upon the grantee to reconvey upon the request of the grantor, and such moral obligation furnishes a sufficient consideration to support such a reconveyance.

When Reconveyance will be Sustained.

Such property, while in the hands of the grantee, would be subject to the claims of his creditors. But where no credit was given on the strength of the apparent ownership of such grantee, and where a reconveyance was made before any claims against the fraudulent grantee attached as liens upon the land, such reconveyance will be upheld as against the creditors of such fraudulent grantee.

Knowledge in Grantee of Fraudulent Purpose.

The fact that the original owner knew that the reconveyance was made by his fraudulent grantee with the intent, upon his part, to hinder, delay, or defraud his creditors, will not taint the transfer, where such original owner requested the same in order to protect and preserve his property.

Appeal from District Court, Walsh County; *Fisk, J.*

Action by Carrie E. Lockren against Helge O. Rustan and others. Judgment for defendants, and plaintiff appeals. Affirmed.

H. A. Libby, for appellant.

Cochrane & Corliss and *Swiggum & Myers*, for respondents.

BARTHOLOMEW, C. J. This action was brought to set aside deeds to a half section of land lying in Walsh county, and another half section lying in Cavalier county, which deeds were executed by the defendant Helge O. Rustan to the defendant Ole Helgeson Rustan, and also deeds of the same lands executed at the same time by Ole

Helgeson Rustan to Finger O. Rustan. The plaintiff is a creditor of Helge O. Rustan, and she claims that the said deeds were given and received in fraud of her rights as such creditor, and in furtherance of a conspiracy on the part of defendants to hinder, delay, and defraud her in the collection of her said debt. All the allegations of fraud and conspiracy in the complaint were denied by the answer. At the trial the defendants prevailed, and the case comes into this court upon plaintiff's appeal for trial anew.

The difficult questions are questions of law. The testimony is not very voluminous, and there are but few contradictions in it, and these are on minor points. The facts, as admitted by the pleadings or fairly established by the evidence, may be stated as follows: In December, 1895, plaintiff commenced an action against Helge O. Rustan to recover damages for breach of promise of marriage. In June, 1896, the case was tried, and a verdict returned for plaintiff for over \$3,000. Immediately upon the coming in of the verdict, and on motion of the defendant in that case, a stay of proceedings for 90 days was entered. At that time, and for some years prior thereto, the record title of all the lands above mentioned was and had been in Helge O. Rustan. During the continuance of the stay, and on August 20, 1896, the transfers above mentioned were made. On October 2, 1896, judgment was entered on the verdict. Very soon thereafter execution issued on the judgment, and was returned *nulla bona*. An alias execution was issued, and levied upon this land as the land of the judgment debtor, Helge O. Rustan, and thereafter this action was brought in aid of such execution.

The family of the defendant Ole Helgeson Rustan consists of a wife and eleven children, and among the children are the defendants Helge O. and Finger O. Rustan. In 1881, Ole Helgeson Rustan, with his family, removed from the State of Minnesota to Walsh county, in this state, and he acquired the title to the Walsh county lands here in dispute under the government land laws. While resident in Minnesota he contracted quite a large indebtedness, which remained unpaid when he settled in Walsh county. He received a receiver's final receipt for 160 acres of said land on December 20, 1881, and very soon thereafter he and his wife joined in a conveyance of said land by warranty deed to one M. Raumin. Said deed was made without any consideration whatever, but with the understanding that the said Raumin should convey said land to Helge O. Rustan, the son of Ole Helgeson Rustan, and the same was so conveyed a few days thereafter by warranty deed. Helge O. Rustan was at that time a lad about 13 years of age. On August 10, 1883, Ole Helgeson Rustan received the final receiver's receipt upon the other quarter section of land in Walsh county, and very soon thereafter he joined with his wife in a conveyance of the same to his brother-in-law, one Mylie. This conveyance was also without consideration, but made with the understanding that the said land should be conveyed to said Helge O. Rustan, and it was so conveyed in 1887. The avowed object of Ole Helgeson Rustan in thus placing the title to

the land in his son was, as he expresses it, "to get protection until he could pay his debts." The law would say, upon this admission, that his object was to hinder, delay, or defraud his creditors, and we will so treat it.

The Rustan family continued to reside upon said land. Ole Helgeson Rustan, the father, treated the land in all respects as if it were his own. He paid all expenses incurred in improving and cultivating the same, and received all the produce therefrom. Helge O. Rustan did not know that the title to the land was in his name until about 1890, as the testimony shows. He had executed mortgages upon some of the land, but had signed the papers at the direction of his father, without understanding what they were. But about 1890 the matter was talked over and explained, and the father told him that the land must be deeded back whenever he (the father) desired it, to which the son fully assented. In 1892 the father purchased the land in Cavalier county, paying the full purchase price himself, but had the title transferred to his son Helge, for the same fraudulent purpose that induced him to have the title to the Walsh county land placed in his son. This the son well understood at the time, and promised to convey it to the father whenever by him so requested. Such was the condition of the title and the relative rights of the parties on August 20, 1896, when the son,—he says at the request of his father,—without any money consideration whatever, conveyed all the land to his father. It should be stated that prior to this time, and prior to the bringing of the breach of promise action, Ole Helgeson Rustan had settled all his old debts, and owed nothing except what was secured. Under this state of facts, was the conveyance from son to father in fraud of the rights of the plaintiff?

It must be conceded that no such conveyance could have been enforced. There was no trust relation between these parties, either by contract or as a resulting trust or *ex maleficio*. Where a trust exists, it can be enforced in equity. The son held the full legal title, and he held the equitable title, as against all the world except the creditors of the father. They, so far as we know, never at any time sought to disturb the title of the son. The land in the hands of the son was subject to his debts. Had a creditor of his obtained judgment against him while the title stood in his name, the judgment would have been a lien upon the land, and no transfer to the father could have affected the lien. To that extent the grantee, in a conveyance made to hinder, delay, or defraud creditors, is the owner of the land. But, as to strangers to the conveyance, the property rights of the fraudulent grantor in the subject of the grant are superior to the property rights of the fraudulent grantee. In other words, in a contest between the creditors of the grantor and the creditors of the grantee, the former will succeed. *Bank v. Lyle*, 7 Lea, 431; *Clark v. Rucker*, 7 B. Mon. 583. This shows that the property rights of the vendor have not been extinguished. But the law, for reasons of public policy and to discourage fraudulent con-

veyances, will not permit him to assert them. If, then, these property rights exist; if the grantor purchased and paid for the property, and has never received anything therefor from the grantee; if the only right or equity that the grantee has in the property is his right to claim the protection of a technical rule of law that will not permit him to be attacked, not by reason of any rights in him, but solely on the ground of public policy,—it must follow that, in good conscience and morals, the grantee ought to reconvey to the grantor, if the latter so request. In *Wait, Fraud. Conv.* § 398, it is said: "Though a reconveyance cannot be enforced, the fraudulent vendee is said, in some of the cases, to be under a high moral and equitable obligation to restore the property. The law is not so unjust as to deny to men the right, while it is in their power to do so, to recognize and fulfill their obligations of honor and good faith; and, until the creditors of the vendee acquire actual liens upon the property, they have no legal or equitable claims in respect to it higher than or superior to those of the grantor." See, also, *Biccochi v. Casey-Swasey Co.* (Tex. Sup.) 42 S. W. Rep. 963; *Davis v. Graves*, 29 Barb. 480; *Dunn v. Whalen* (Sup.) 21 N. Y. Supp. 869; *Moore v. Livingston*, 14 How. Prac. 1; *Starr v. Wright*, 20 Ohio St. 107; *White v. Brokaw*, 14 Ohio St. 341; *Bank v. Brady*, 96 Ind. 509; *Sabin v. Anderson* (Or.) 49 Pac. Rep. 872. There being, then, a moral obligation of the highest type resting upon the son to convey to the father, the discharge of that obligation furnishes ample consideration for such conveyance, and the conveyance, if received in good faith, works no legal fraud upon any party whose rights to the property conveyed are not in law superior to the rights of the father.

How stood the relative rights of this plaintiff and the father? It must be remembered that no principle of estoppel is present in this case. Plaintiff did not extend credit to Helge O. Rustan on the strength of his apparent ownership of the property. Her claim is based upon a tort. No credit was ever extended. It has been held, however, that the grantee's creditors could obtain no rights by way of estoppel superior to those of the fraudulent grantor. See *Biccochi v. Casey-Swasey Co.*, supra, and cases cited. The efficiency of a moral obligation to uphold a transfer, as against creditors, has frequently been asserted by courts, where property has been transferred in satisfaction of a debt barred by the statute of limitations, or from which the party had been discharged in bankruptcy, or other like circumstances, where only the moral obligation to pay remained. *French v. Motley*, 63 Me. 326; *Bank v. Kimble*, 76 Ind. 195; *Livermore v. Northrup*, 44 N. Y. 107; *McConnell v. Barber* (Sup.) 33 N. Y. Supp. 480; *Keen v. Kleckner*, 42 Pa. St. 529; *Leake v. Anderson* (S. C.) 21 S. E. Rep. 439; *Pierce v. Wimberly* (Tex. Sup.) 14 S. W. Rep. 454. It has also been directly held that the claims of the creditors of the fraudulent grantee, before reduced to judgment, or in some manner fastened as a lien upon the property, are not superior to the claim of the

fraudulent grantor to have property reconveyed to him. *Davis v. Graves*, 29 Barb. 480; *Powell v. Ivey*, 88 N. C. 256; *Clark's Adm'r v. Rucker*, 7 B. Mon. 583; *Bicocchi v. Casey-Swasey Co.* (Tex. Sup.) 42 S. W. Rep. 963; *Caffal v. Hale*, 49 Iowa 53; *Lillis v. Gallagher*, 39 N. J. Eq. 94; *Matthews v. Buck*, 43 Me. 265; *Association v. Roll*, 137 Ill. 205, 27 N. E. Rep. 184. These well-settled propositions force the conclusion in this case that the conveyance from Helge O. Rustan to Ole Helgeson Rustan was based upon a sufficient consideration, and that it must be upheld as against the claims of the creditors of Helge O. Rustan, whose claims had not been reduced to liens upon the property, unless such conveyance was made and received with intent to hinder, delay, or defraud the creditors of Helge O. Rustan.

In reaching a proper conclusion upon this point, several considerations must be kept in mind. So far as this record shows, Helge O. Rustan had no creditors aside from this plaintiff, who had a claim for damages for tort that had reached the stage of a verdict, but not of a judgment. As we have seen, her inherent equities were in no manner superior to those of Ole Helgeson Rustan. Again, he had a large family to support, and no means of support, or, more accurately, but very limited means of support, aside from the land, all of which stood in the name of Helge O. Rustan, who had no real ownership thereof or interest therein. On the other hand, it is perfectly apparent from this record that the Rustans, father and son, believed the claim of plaintiff to be unfounded and unjust, and they were bitterly opposed to permitting her to realize anything thereon. The intention of the parties must be gathered largely from the surroundings. The direct evidence is not very satisfactory. The son testifies that he executed the conveyance because his father requested him so to do. He denies emphatically that there was ever any conversation between the parties to the conveyance or any understanding that the transfer should be made to hinder or defeat a recovery by plaintiff on her claim, and upon this point the testimony of the father is practically the same. But if Helge O. Rustan had been the absolute owner of the land, and had sold it to his father for full consideration, or had transferred it to him in satisfaction of a debt owing by him to the father, we think, under the circumstances, the conclusion would be warranted, if not irresistible, that his object was to hinder and delay the plaintiff in the collection of her claim, and we hold that such was his purpose and intent.

But that intent upon his part alone, even if known to his grantee, may not be sufficient to invalidate the deed. As we have seen, there was a consideration for the conveyance. But that is not sufficient. It has been held many times that, where the grantee participated in the fraudulent intent, the fact that he paid full consideration would not save the conveyance when attacked by creditors of the grantor. See *Wait, Fraud. Conv.* (3d Ed.) § 201. But this rule in its entirety applies only to cases of purchase for a present

consideration, and in such cases it is held that, where the grantee purchases with knowledge of the fraudulent intent on the part of his grantor, that fact alone fixes his participation in the fraud. *Greenlee v. Blum*, 59 Tex. 127; *Wait*, *Fraud. Conv.* (3d Ed.) § 199. But a different rule prevails where the conveyance is made in satisfaction of a pre-existing indebtedness. There the effect of the transaction is to prefer one creditor to another, and that a debtor has a right to do unless restrained by statute. If the creditor receives only so much property as is reasonably necessary to satisfy his debt, and receives it in good faith for that purpose, the fact that he may know that his grantor is actuated solely by a desire to defraud his other creditors will in no manner taint the transaction. *Paulson v. Ward*, 4 N. D. 106, 58 N. W. Rep. 792; *Cooper v. Bank*, (Ala.) 11 South. Rep. 760; *Nadal v. Britton* (N. C.) 16 S. E. Rep. 914; *Young v. Clapp* (Ill. Sup.) 32 N. E. Rep. 187; *Bannister v. Phelps*, 81 Wis. 256, 51 N. W. Rep. 417; *Coal Co. v. Burnham* (Neb.) 72 N. W. Rep. 487; *Koch v. Peters*, 97 Wis. 492, 73 N. W. Rep. 25; *Carcy v. Dyer*, 97 Wis. 554, 73 N. W. Rep. 29; *Claffin Co. v. Grashorn*, 99 Wis. 357, 74 N. W. Rep. 783; *Mapes v. Burnes*, 72 Mo. App. 411. The reasons that have been assigned for the distinction between one who purchases for a present consideration and one who purchased in satisfaction of a pre-existing debt are sound and unassailable. The former is in every sense a volunteer. He has nothing at stake,—no self-interests to serve. He may, with perfect safety, keep out of the transaction. Having no motive of interest prompting him to enter it, if yet he does enter it, knowing the fraudulent purpose of the grantor, the law, very properly, says that he enters it for the purpose of aiding that fraudulent purpose. Not so with him who takes the property in satisfaction of a pre-existing indebtedness. He has an interest to serve. He can keep out of the transaction only at the risk of losing his claim. The law throws upon him no duty of protecting other creditors. He has the same right to accept a voluntary preference that he has to obtain a preference by superior diligence. He may know the fraudulent purpose of the grantor, but the law sees that he has a purpose of his own to serve, and, if he go no further than is necessary to serve that purpose, the law will not charge him with fraud by reason of such knowledge.

In the case at bar it is too plain for suggestion that Ole Helgeson Rustan, in receiving the conveyance from his son, occupied the position of one who received the conveyance in extinguishment of a pre-existing obligation. He had the highest motive of self-interest to serve. If he did not obtain the deed to this land, circumstances might, and probably would, make it forever impossible for the son to fulfill his obligation to his father. True, he knew that, by receiving satisfaction of this obligation, he necessarily postponed the claim of plaintiff. But he was under no obligation, legal or moral, to protect her rights. Indeed, in some respects, his equities are greater than those of an ordinary creditor who receives

a conveyance. Generally, the grantor cancels his obligation by transferring his own property in satisfaction thereof. Here the grantor canceled his obligation by transferring to the grantee what was in morals, but not in law, the grantee's own property. We are clear that no fraud can be charged to this grantee, unless the evidence and circumstances establish the fact that he took the conveyance, not to save his property, but to hinder, delay, or defraud plaintiff. We do not think that is the case. True, the ever-present thought that he regarded plaintiff's claim as unjust, and was bitterly opposed to permitting her to receive anything thereon, makes it difficult to draw the distinction. The grantee testifies that he told his son that he wanted the land back, and requested him to make the deed; that he knew his son was getting into trouble by reason of plaintiff's claim, and he feared that, if the land was left in the son's name, the plaintiff might get hold of it; that she might get a judgment that would be a lien upon it. He categorically denies that his object in taking the conveyance was to hinder or defraud plaintiff, and this, we think, is substantially true, notwithstanding his aversion to her recovering anything. The desire that he may have had that his son should not pay this claim must, in the nature of things, have been entirely subordinate to his desire that the son should not pay the debt with his (the father's) property. His interest in protecting and preserving his own property must have been immeasurably greater than any interest he could have in defrauding plaintiff. We are bound to believe that he was influenced by the stronger, and not by the weaker, motive, particularly when all the direct evidence so declares. And, indeed, in protecting and preserving his own property, he could not defraud plaintiff, because she could have no claim upon his property. But it is urged that it is certain that he did not take the property back because he wished to preserve it for himself, for the reason that he immediately conveyed it to another son, and the trial court found that this transfer was without consideration. We do not deem this latter point of importance. It is clear to us that in deeding the property to another son he acted *ex abundanti cautela*, and in the mistaken belief that he was thus placing another barrier between his property and the danger that menaced it. We find nothing in the record that requires a reversal. We adopt the judgment and decree of the trial court, which are in all things affirmed. All concur.

(81 N. W. Rep. 60.)

E. S. KNEELAND *vs.* GREAT WESTERN ELEVATOR COMPANY.

Opinion filed November 11, 1899.

Sales—Delivery—Insufficient Amount—Evidence—Hearsay—Review—Prejudicial Error.

Plaintiff sues to recover, in addition to other damages, damages for an alleged underdelivery of flax. At the trial the jury were to

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determine from the evidence how much flax was actually delivered to plaintiff on the cars. The plaintiff saw some of the flax weighed into the cars, but not all of it. Plaintiff was a witness, and on cross-examination stated in figures the exact amount, in net bushels, of flax which was delivered, and then admitted that he predicated this statement upon the amount of the pay for the flax which was remitted to him by his agent at Duluth, who sold the flax. The statement that he was paid for a certain net amount in bushels was frequently repeated by the witness. Counsel for defendant moved to strike out this evidence as hearsay. The motion was denied. *Held*, that the ruling was prejudicial error.

Instruction to Disregard Evidence—Error Not Cured.

During the trial, and the next day after said motion was denied, the plaintiff's counsel requested the court to instruct the jury to disregard all of plaintiff's testimony as to the gross amount or actual amount of flax delivered to plaintiff in the cars. The trial court, referring in terms only to the gross amount put in the cars, directed the jury to disregard the testimony of the plaintiff as to the same. But neither the plaintiff's counsel nor the court attempted to withdraw from the jury the evidence of the plaintiff as to the amount of flax for which he received pay from his agent. *Held*, that the obnoxious evidence was not all withdrawn, and hence such withdrawal as was made failed to cure the error involved in the admission of the hearsay evidence.

Appeal from District Court, Traill County; *Pollock*, J.

Action by E. S. Kneeland against the Great Western Elevator Company for insufficient delivery of flax sold. From a judgment in favor of plaintiff, defendant appeals.

Reversed.

Cochrane & Corliss, for appellant.

Carmody & Leslie, for respondent.

WALLIN, J. The trial of this action resulted in a verdict for the plaintiff. A motion for a new trial was made upon the ground of errors of law occurring at the trial, and the insufficiency of the evidence to justify the verdict. A new trial being denied, judgment was entered in favor of the plaintiff, and the defendant has appealed to this court from such judgment.

The facts, briefly stated, upon which the action is based, are as follows: The defendant issued from its elevator located at Blanchard, N. D., certain elevator tickets, calling for 1,218 bushels of flax, and 930 bushels of wheat, of the grade denominated "No. 1 Northern." In October, 1895, the plaintiff, who held said tickets, presented the same to the defendant's agent at its elevator at Blanchard, and demanded the grain called for by the tickets. Pursuant to such demand the defendant then and there delivered to the plaintiff, on the cars, a quantity of wheat and flax. Plaintiff claims, and this is the gist of his grievance: First, that defendant did not deliver to plaintiff the full amount of the flax called for by the tickets, within 89 bushels and 30 pounds; and, second, that the defendant failed to deliver plaintiff any wheat of the grade stated in the tickets, but did deliver plaintiff No. 2 wheat instead of No.

1 Northern. Plaintiff claims damages on account of the alleged reduced grade of the wheat in the sum of 2 cents a bushel, and, on account of the flax alleged to be not delivered, the sum of 85 cents per bushel.

The decisive questions of fact for the jury to determine were: First, whether the wheat placed on the cars was No. 1 Northern or No. 2 wheat; second, whether the defendant delivered on the cars the amount of flax called for by the tickets, or a less amount. Plaintiff was a witness in his own behalf, and with respect to these issues of fact, testified, in substance, that he was present when a part of the flax was weighed into the cars, and saw all of one car delivered, and part of both,—saw all of one car weighed in; that he took the agent's word as to what was weighed into the car he did not see. The witness stated: "I knew how many bushels were delivered into both cars. In the two together, I believe it was 1,128 bushels and 30 pounds. The agent claimed to have delivered 1,218 bushels, net. I cannot give the gross weight." Counsel for defendant was permitted to examine the witness with a view to expose the fact that his testimony was improper and hearsay, and, while doing so, asked the following question: "Q. How did you arrive at the amount of the flax as being 1,128 bushels and 30 pounds at that time?" To this question the witness answered: "That was the amount I was paid for." Defendant moved to strike out this answer as "incompetent, hearsay, and not the best evidence." This motion was overruled, and an exception was taken to the ruling. The witness further testified: "I do not know now the gross weight of the stuff that was loaded into either of these cars at Blanchard on the 16th day of October, 1896, neither the net weight." The witness further said, referring to a former trial of the action: "If I testified on the other trial I only saw part of one car weighed, I presume that was right. I took the agent's word for one, and I saw the other weighed." The witness was asked as follows: "Your testimony as to the number of bushels delivered to you—1,128—is not based on the weight actually given to you at that time?" The witness answered: "No, sir. Q. That is predicated on the reports made to you from the selling agent? A. That is the amount I got pay for. Q. And it is on that you predicate your testimony as to the 1,128 bushels and 30 pounds? A. That was the amount I was paid for. Q. That is what you predicate your testimony on as to the amount of flax you got? A. Yes; that was the amount I was paid for. Q. And the amount you were paid for is the basis of your testimony as to the amount of flax you received? A. Well, I believe so; something of that kind." This witness further testified that he did not go to Duluth, where the grain was marketed. He got his returns two or three weeks after the shipment. He was paid by draft or check transmitted through the mails to certain banks. After this testimony was elicited on cross-examination, counsel for defendant moved to strike out all the testimony of the witness as to the amount of flax in

the two cars, on the ground that the same was incompetent and hearsay. This motion was denied, and an exception was saved to such ruling. It should be further stated that the defendant received into one of the two cars in question, in addition to the flax placed therein by the defendant, 109 bushels and 40 pounds of flax, which flax was delivered to plaintiff by another concern, viz: the Northwestern Elevator Company.

When the evidence was closed, the trial court, while instructing the jury, used the following language: "During the introduction of the testimony on the part of the plaintiff, the plaintiff gave some evidence with reference to the gross number of pounds of flax which were in the cars. At the opening of the trial to-day, the plaintiff expressly withdrew those statements, if any he made, from the jury. The plaintiff, as the court understands it, does not claim to have any personal knowledge of the exact number of pounds of flax which was shipped out, and any knowledge which he may have is hearsay, which testimony could not be allowed, under the rules of evidence; and the court now warns you to disregard any statements made by the plaintiff with reference to the gross number of pounds of flax which were delivered to him in the cars, as described in his testimony."

The defendant's counsel has assigned the several rulings to which we have made reference as error; and counsel contend that the prejudicial effect of the evidence in question was not cured by the trial court, when, at the close of the trial, the jury were instructed to disregard the evidence of the plaintiff as to the gross number of pounds of flax which were delivered to him on the cars. That the evidence of the plaintiff as to either the gross or net number of bushels of flax delivered on the cars is mere hearsay is conceded by counsel, and is, moreover, obviously true. The plaintiff did not weigh or measure the grain personally, nor did he see all of it weighed, when put on the cars, or at any time. Being pressed, he admitted that he predicated his repeated declarations as to the exact number of bushels of flax delivered to him upon the remittances made to him by the Duluth parties who sold the grain for him. This testimony demonstrates that plaintiff was not in a position to testify upon this decisive point in the case as of his own knowledge, and that all his information came secondhand, and was pure hearsay. The inadmissible character of this evidence was made to appear by a preliminary cross-examination made by defendant's counsel with the avowed object of showing that it was inadmissible; and, after its character as hearsay evidence was clearly developed, counsel moved to strike the same from record as hearsay. This motion was denied. That such ruling was error is too clear for discussion. It violated the rule of evidence which excludes hearsay. Nor can there be any doubt, in our judgment, that the evidence was of a strongly prejudicial character. The testimony related to the most important question of fact in the case, namely, as to the exact quantity of flax actually put in the cars at Blanchard. The

plaintiff owned the flax, and was present and saw a part of it weighed. He also sold the flax, and received remittances, which he testified were the proceeds of the sale. Under the circumstances, a jury of laymen would, in our judgment, be strongly impressed and influenced by plaintiff's oft-repeated declaration as a witness that he received from defendant 1,128 bushels and 30 pounds of flax, net weight, and no more. The importance of firmly maintaining the well-approved rules of evidence is forcibly put in the case of *Queen v. Hepburn*, 7 Cranch, 290, 3 L. Ed. 348. In the course of the opinion of the court in that case, Chief Justice Marshall, who formulated the opinion, uses this language: "It was very justly observed by a great judge that 'all questions upon the rules of evidence are of vast importance to all orders and degrees of men. Our lives, our liberty, and our property are all concerned in the support of these rules which have been matured by the wisdom of ages, and are now revered from their antiquity and the good sense in which they are founded.'" The chief justice further said: "One of these rules is that hearsay evidence is in its own nature inadmissible. That this species of testimony supposes some better testimony which might be adduced in the particular case is not the sole ground of its exclusion. Its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practiced under its cover, combine to support the rule that hearsay evidence is totally inadmissible." Of course, there are numerous exceptions to this rule; but, as this case does not fall within any of the exceptions, they need not be noticed here. Perhaps the controlling ground upon which hearsay is excluded is the fact that it comes from parties who are not sworn as witnesses, and hence such testimony is mere unsworn statements coming before the court from persons who are not witnesses, and hence could not be cross-examined. The evil of allowing such evidence to go before a jury is well illustrated in this case. The plaintiff, as a witness, repeatedly stated that the defendant delivered just exactly 1,128 bushels and 30 pounds of flax in the cars at Blanchard. Under cross-examination it was demonstrated that the plaintiff did not and could not know of his own knowledge how much flax was delivered. The witness, it appears, was basing his statements upon the reports made to him of sales made by his agents at Duluth. But such reports came through banks, and were not, therefore, made directly to the witness; hence, the witness obtained his information, not only by hearsay, but hearsay at secondhand. The information came from parties who were not sworn, and hence could not be cross-examined to ascertain how much flax was actually sold, what price was received for the same, how much was deducted as commission by the agent, and, finally, how much of the proceeds of the flax which belonged to the plaintiff were actually remitted to him. The cases cited below arose upon states of fact which are similar and analogous to those of this case, and are, in our judgment, authority directly in point. *Olive v.*

Hester, 63 Tex. 190; *Hoskins v. Railway Co.*, 19 Mo. App. 315; *Barrett v. Wheeler*, 71 Iowa, 662, 33 N. W. Rep. 230. As we have said, the evidence under consideration was not merely inadmissible, but was, in our view, strongly prejudicial to the defendant.

But counsel for respondent, while conceding that this evidence was improperly admitted, insist that it could not prejudice the defendant, because, as counsel claim, it was withdrawn by the plaintiff's counsel, and the trial court, at counsel's request, directed the jury to disregard the same in their deliberations upon the evidence. But an attentive reading of the record discloses the fact that all of the obnoxious evidence of the plaintiff was not withdrawn by plaintiff's counsel, nor were the jury instructed by the trial court to disregard all of such evidence. As to the plaintiff's withdrawal of such evidence, the record is as follows: "The plaintiff consents that the court shall instruct the jury to disregard any evidence which may have been given by the plaintiff as to the gross number of pounds, or the actual number of pounds, of flax delivered to him by the defendant's agent, and consents that the same may be stricken from the record." Returning to the instructions of the court upon this matter, we discover that such instructions have reference particularly to the testimony of plaintiff as to the gross number of pounds of flax delivered on the cars, and no mention is made by the court in terms, of plaintiff's repeated statements as a witness (giving the figures) of the net amount of flax delivered on the cars. Another fact of prime importance in this connection is that plaintiff's counsel did not withdraw from the jury, or consent to strike out, plaintiff's evidence as to the amount of flax for which he was paid. Nor did the trial court warn the jury to disregard this highly-important feature of the plaintiff's testimony. It therefore appears that only a portion of the mischievous testimony was taken away from the jury. That portion which was left with the jury bore upon a vital question of fact, *i. e.* the net amount of flax delivered on the cars. As we have seen, the plaintiff was repeatedly allowed to testify, in terms, as to the amount of the net delivery. The witness repeatedly gave the exact net figures. To bolster this, the witness was permitted against objection to state that such net amount was the amount for which he received pay, and, as we have seen, these features of the evidence were left with the jury for consideration. It follows that the case before us does not call for a ruling upon the general question which arises in a case where all of the evidence improperly admitted is further withdrawn from the case by counsel and such withdrawal is followed by a direction of the court to disregard the same and the whole thereof. As to the effect of receiving illegal evidence, the Court of Appeals of New York, in *Anderson v. Railroad Co.*, 54 N. Y. 334, says: "The reception of illegal evidence is presumptively injurious to the party objecting to its admission; but where such presumption is refuted, and it is clear beyond rational doubt that no harm was done to the party objecting, and that the illegal evidence did not and could not affect the result, the error furn-

ishes no ground for reversal." In the same case the court uses this language: "Evidence cannot be said to be entirely harmless when the party objecting to it is obliged to call a witness to explain or contradict it." In the case at bar the evidence of the plaintiff as to the net amount of flax delivered was vitally important, and unless overthrown, would have a decisive influence upon the jury. Its effect could not be overcome without calling other witnesses to disprove the plaintiff's statements. As we have already said, the facts of the case do not require a ruling upon the question of the effect of the withdrawal of certain illegal evidence. Only a part of the hearsay evidence was withdrawn, or referred to in the instruction of the court to the jury which we have quoted. After such withdrawal, much hearsay evidence that was highly prejudicial was permitted to remain with the jury. For this error the judgment must be reversed, and a new trial granted. All the judges concurring.

(81 N. W. Rep. 67.)

PEHR PETERSON ??. ST. ANTHONY & DAKOTA ELEVATOR COMPANY.

Opinion filed November 7, 1899.

Chattel Mortgage—Waiver of Lien.

In this case the owner of a chattel mortgage authorized and requested the mortgagor to haul away the wheat covered by the mortgage, and sell the same, and pay him (the mortgagee) with the proceeds. *Held*, that such consent to a private sale of the property operated as an implied waiver of the lien of the mortgage, whereby the mortgage was defeated.

Appeal from District Court, Richland County; *Lauder, J.*
Action by Pehr Peterson against the St. Anthony & Dakota Elevator Company. Judgment for plaintiff. Defendant appeals.
Reversed.

McCumber & Bogart and *Wilson & Van Derlip*, for appellant.
W. E. Purcell (*Chas. E. Wolfe*, of counsel), for respondent.

WALLIN, J. This action was brought to recover damages for the alleged conversion of certain wheat upon which plaintiff had a chattel mortgage. The trial in the District Court was had without a jury, and judgment was entered in favor of the plaintiff. The defendant appealed from such judgment, and the action is now before this court for trial *de novo*.

On the trial it was stipulated that the mortgagor delivered at defendant's elevator at Stiles, N. D., 135 bushels of wheat, worth 65 cents per bushel; and it is practically uncontroverted that the plaintiff bought the wheat of the mortgagor, and at his request paid one Kinney for such wheat; also, that the plaintiff had a chattel mortgage upon the wheat to secure a sum in excess of the judgment.

Appellant's counsel contend that the judgment should be reversed.

and base their contention upon two grounds: (1) Upon the ground that it does not appear that before the action was brought there was a demand made for the wheat, followed by a refusal to deliver the same; (2) that it does affirmatively appear that there was a waiver by the plaintiff of the lien created by the mortgage, whereby the lien was destroyed, prior to the sale of the wheat to defendant. We shall have occasion, in disposing of the case, to consider only the point of waiver, and will be compelled to hold, under the evidence, that plaintiff did waive the lien of the mortgage. A perusal of the testimony given by plaintiff's witnesses discloses that plaintiff—the mortgagee—visited the premises where the grain was grown on the day the mortgagor finished threshing in the year in question, and on that occasion requested the mortgagor to pay the debt secured by the mortgage. The mortgagor replied, in substance, that he would have to sell the wheat before he could get the money to pay with. To this plaintiff replied, in substance, that the mortgagor should go and get it. The mortgagor testified as follows: "Well, he didn't really tell me I should sell it. But I told him I would have to haul the wheat before I could get the money. Then he said I should get the money,—he wanted the money." The testimony of the plaintiff is equally clear, and to the same effect. While on the stand, the plaintiff was asked as follows: "Q. Did you ever tell him anything about it? A. I told him to haul the wheat and sell it, and then I sent the deputy sheriff out to take care of it." It appears that plaintiff gave the notes secured by the mortgage to the deputy sheriff for collection, but the testimony further shows that such officer did not take any action with respect to the matter; nor is it claimed that any attempt was ever made to take possession of the wheat under the mortgage, for purposes of foreclosure or at all. The testimony we have adverted to comes from the plaintiff's witnesses, and the same is not disputed in any manner. It shows that the mortgagee saw fit to authorize the mortgagor to sell the property covered by the mortgage at private sale; and this authority was given under such circumstances as would, if acted upon, result, not only in a removal of the property from the premises of the mortgagor, but likewise in mixing the same with other grain, in one common mass, thereby rendering it impossible for the mortgagee thereafter to identify the property and take possession of it for purposes of foreclosure. These facts, in our judgment, must operate as an implied waiver of the lien of the mortgage. The case falls squarely within the case of *New England Mortg. Sec. Co. v. Great Western Elevator Co.*, 6 N. D. 407, 71 N. W. Rep. 130. See, also, *Hogan v. Elevator Co.*, 66 Minn. 344, 69 N. W. Rep. 1; *Partridge v. Elevator Co.* (Minn.) 78 N. W. Rep. 85; *Roberts v. Crawford*, 54 N. H. 532. The further fact appears that the mortgagor, on the day following the interview with the plaintiff to which we have made reference, hauled the wheat in question to the elevator, and there sold it to the defendant, and, under the mortgagor's instructions so to do, the

defendant paid the proceeds of the sale to one Kinney, who it appears claimed to have a prior mortgage on the wheat. The mortgagor testified that the "hailed it for Mr. Kinney," but on cross-examination said he did not see Kinney, except at the elevator. We regard this testimony, however, as unimportant upon the question of waiver. The mortgagor was, in effect, authorized and requested by the mortgagee to haul the grain to market and sell the same, and bring the proceeds to the mortgagee. On the next day thereafter the grain was hauled and sold. Under these circumstances, we think the authority to sell, followed by an actual sale, cannot be defeated by a claim that some other person also requested the mortgagor to sell the same grain, and that the sale was made pursuant to the request of such other person. The fact of waiver or nonwaiver in a given case cannot be determined by the number of persons who may request a mortgagor to sell the mortgaged property. The crucial question is whether the plaintiff, holding a chattel mortgage, authorized the debtor to sell the property at private sale, and whether subsequently thereto such sale was actually made. Of course, a mere consent to a sale, not acted upon in any manner, would not operate as a waiver. Upon the ground of waiver alone, we hold that the judgment for plaintiff was erroneously entered, and must therefore be reversed. The trial court will reverse its judgment, and enter a judgment dismissing the action, with costs of both courts to defendant. All the judges concurring.

(81 N. W. Rep. 59.)

JOHN MAHON, *et al.* vs. WM. SURERUS, *et al.*

Opinion filed November 9, 1899.

Mechanic's Lien—Amendment of Statute—Effect.

Rights under a mechanic's lien law are fixed by the law in force when the contract is made, and the labor or materials furnished, and the lien statement filed; and if subsequently the law is changed the rights thus acquired cannot be affected, but they will be enforced under the provisions of the law in force when the action to foreclose the lien is brought.

Lien Upon Building on Homestead—Right to Remove Building.

Under the mechanic's lien law, as it stood in the Compiled Laws of 1887, a party who, under contract with one who resided upon land upon which he had made a homestead filing, but had not made final proof thereon, furnished lumber to be used, and which in fact was used, in the erection of the dwelling house upon said land, for the use of the party residing thereon, was entitled to a lien upon such house for the value of the materials so furnished, and to have such house sold to satisfy such lien, and removed from such land.

Meaning of "Owner" Under Lien Law.

The party residing upon such land, and for whose immediate use the house was built, was the owner of the land, under the terms of section 5483, Comp. Laws.

Sale of Building on Homestead—Does Not Violate Federal Statute.

The sale and removal of such house in no way conflict with the provisions of section 2296, Rev. St. 1878, which, in substance, declares that land acquired under the homestead act shall not be sold for any debt contracted before the issuance of the patent therefor.

Appeal from District Court, Cavalier County; *Sauter, J.*

Action by John Mahon and John B. Robinson against William Surerus and Edward I. Donovan. Judgment for defendant Donovan, and plaintiff's appeal.

Reversed.

J. C. Monnet, for appellants.

W. J. Kneeshaw, for respondent.

BARTHOLOMEW, C. J. The plaintiffs seek by this action to foreclose a lien for the price of certain materials which they allege they sold to the defendant Surerus, to be used, and which in fact were used, in the construction and erection of a dwelling house upon certain described lands. The defendant Donovan is a subsequent purchaser from Surerus. Donovan alone answered. He denied the allegations of the complaint, and pleaded ownership of the land. The judgment below was in favor of defendant Donovan.

The only disputed question of fact is whether or not the evidence sufficiently shows that the materials were in fact used in the construction and erection of the house in question. We hold that it does sufficiently establish that fact. The other controlling and undisputed facts are as follows: The contract between plaintiffs and Surerus was entered into about July 2, 1889, and by its terms plaintiffs undertook to furnish said Surerus with the lumber and building material for the erection of a house upon the E. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of, and lots 1 and 2 in, section 7, township 161 N., range 60 W., in Cavalier county, N. D.; that such materials were in fact furnished and delivered to said Surerus at various times from the date of said contract to November 16, 1891; that on March 18, 1893, plaintiffs filed in the proper office a proper statement for lien for the balance due for such materials, the amount being \$79.75, with interest from November 21, 1891; that during all of said time the defendant Surerus had a government homestead filing upon said land, and was residing thereon; that on April 6, 1893, he made final proof thereon, and received a receiver's final receipt; that on July 20, 1893, he conveyed the land by warranty deed to the defendant Donovan, which deed recited that the land was free from all incumbrances, except a mechanic's lien for \$80, which it is conceded is the lien here in question; and on August 28, 1893, a patent for said land issued to said Surerus. It will be noticed that the contract was made, the materials furnished, and the lien filed before Surerus obtained any patent for the land, and before he made final proof thereon. It is conceded that the property can be charged with no other or greater liability, by reason of the facts stated, in the hands of Donovan than in the hands of Surerus.

Defendant Donovan relies upon section 2296, Rev. St. U. S., which declares, "No lands acquired under the provisions of this act shall in any event become liable to the satisfaction of any debt or debts contracted prior to the issuing of the patent therefor." It has been held in Kansas (*Lumber Co. v. Jones*, 32 Kan. 195, 4 Pac. Rep. 74) that no lien would attach either to the land or building until the patent was earned. But it is stated that under the Kansas statute the lien attaches to real estate only, and not to personalty. The same ruling has been made in Wisconsin. *Paige v. Peters*, 70 Wis. 178, 35 N. W. Rep. 328. In the case at bar the plaintiffs in their complaint claimed a lien both upon the building and the land, but they now ask only a lien upon the building. Whether or not a lien exists to that extent must, of course, depend upon our local statutes. The mechanic's lien law, as it appears in the Revised Codes of 1895, differs in some respects from the law as it appeared in the Compiled Laws of 1887. It was under the Compiled Laws that this contract was made, and the materials furnished, and the lien filed. Consequently the rights of the parties were fixed by that law. The later law may be looked to for matters of procedure, but all questions of rights must be decided under the law in existence when those rights were fixed. *Andrews v. Washburn*, 11 Miss. 109; *Milling Co. v. Riley*, 1 Or. 183; *Gilson v. Emery*, 11 Gray, 430; *Phillips v. Mason*, 7 Heisk. 61.

Section 5469, Comp. Laws, reads as follows: "Every mechanic, or other person who shall do any labor upon, or furnish any materials, machinery or fixtures for any building, erection or other improvements upon land, including those engaged in the construction or repair of any work of internal improvement, by virtue of any contract with the owner, his agent, trustee, contractor or subcontractor, upon complying with the provisions of this chapter, shall have for his labor done, or materials, machinery, or fixtures furnished, a lien upon such building, erection or improvement, and upon the land belonging to such owner, on which the same is situated, to secure the payment of such labor done, or materials, machinery, or fixtures furnished." Many statutes give a lien upon the land, including the building, erection, or improvement. This statute is not so worded. It recognizes the lien upon the building as a distinct right, and, in addition, gives a lien upon the land. That it was the legislative purpose to give distinct liens further appears from section 5480, which reads: "The lien for the things aforesaid, or work, shall attach to the buildings, erections or improvements, for which they were furnished or done, in preference to any prior lien or incumbrance, or mortgage upon the land upon which the same is erected or put, and any person enforcing such lien, may have such building, erection or other improvement, sold under execution, and the purchaser may remove the same within a reasonable time thereafter." A careful scrutiny of the language of this section will show that while primarily it was intended for the relief of a lienholder, where there were prior liens on the land,

yet his right to sell the building separately is not limited to such cases. The section says, "Any person enforcing such lien may have such building," etc. "Such lien" refers to "the lien for the thing aforesaid," as stated in the first line of the section. The lienholder might in any case have the building sold separately and removed. This was a valuable right. It often happened, in the early settlement of Dakota territory, that expensive buildings were erected, and subsequent events, such as the locating of railroads or changing of business centers, rendered them practically worthless where they were, but they would have value if they could be removed. Our construction of these statutes leads to the conclusion that plaintiffs had a lien upon the house that in no manner affected the land. It will be noticed that the right to remove the building is not dependent upon the manner in which the building is attached to the land. It may stand upon blocks, or it may rest upon the most substantial stone or brick foundation. It is true, the statute requires the contract for the material to be made with the owner of the land; but section 5483, Comp. Laws, defines the word "owner" in this connection. It declares: "Every person for whose immediate use and benefit any building, erection or improvement is made, having the capacity to contract, including guardians of minors, or other persons, shall be included in the word 'owner' thereof." It is undisputed that the house was erected for the immediate use and benefit of the defendant Surerus, who was residing upon the land, and it was with him that the contract was made.

The District Court will set aside its judgment heretofore entered in this case, and enter judgment against the defendant William Surerus for the sum of \$79.75, with interest thereon at seven per cent. from November 16, 1891, and the costs of this action in both courts incurred. It will further adjudge and decree said judgment to be a lien upon the frame dwelling house situated upon the E. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$, and lots numbered 1 and 2, of section 7, township 160 N., range 60 W., in Cavalier county, N. D., and that said lien attached as of March 18, 1893, and directing that a special execution issue against said house, and that the same be sold, in manner and time as the statute provides, to satisfy said judgment and costs and accruing costs, and directing that the purchaser at said sale have 90 days from the date thereof in which to remove said building from said land, and that general execution issue against the defendant William Surerus for any balance that may remain unsatisfied.

Reversed. All concur.

(81 N. W. Rep. 64.)

MARY LEALOS vs. UNION NATIONAL BANK OF GRAND FORKS.

Opinion filed November 10, 1899.

Right to Recover Usury Paid is Personal to the Borrower.

The right given by section 5198, Rev. St. U. S., to recover double the interest paid to a national bank, when the interest so paid is

greater than allowed by the laws of the state, is personal to the party paying such usurious interest; and an action to recover the same can be maintained only by such person, or his or her legal representative.

One of Two Joint Makers Cannot Recover for Usury.

Where two persons execute their joint note in favor of a national bank, which note is claimed to be wholly for usury, and the same is paid by one of the joint makers, an action cannot be maintained, under the section above referred to, to recover the penalty therein provided, by the other maker. The cause of action accrues to the person making the payment.

Executrix Cannot Recover Usury Not Paid by Decedent.

A complaint, by an executrix of the last will and testament of her deceased husband, to recover double the interest paid for money borrowed from a national bank by her husband during his lifetime, which shows that no payments were made thereon by the husband, and that the total payments made to the bank by her as executrix did not equal in amount the sum alleged to have been borrowed, with lawful interest, and that the additional payments which constituted the usury were made by her in her individual capacity, prior to qualifying as executrix, does not state a cause of action in her representative capacity, under said section. Whether the action to recover for usury paid by an executrix should be maintained in her representative capacity, or individually, not decided.

Appeal from District Court, Grand Forks County; *Fisk, J.*

Action by Mary Lealos, administratrix of Edward Lealos, against the Union National Bank of Grand Forks. Judgement for plaintiff. Defendant appeals.

Reversed.

Cochrane & Corliss, for appellant.

Plaintiff is seeking to recover, so far as the allegation in her complaint is concerned, upon a contract between Edward Lealos in his life time, and the appellant. Under this averment and over timely objection she offered in evidence a written contract for a different amount than that alleged, and a joint contract of Edward and Mary Lealos. It was error to receive this contract in evidence. *Mayor v. Wilson*, 9 N. E. Rep. 17; *Cunningham v. Hobart*, 7 Gray, 423; *Dennis v. Spencer*, 45 Minn. 250. Plaintiff's action is upon a penal statute to recover a statutory penalty. *Greenberg v. Bank*, 5 N. D. 483; *Hancock v. Hodgson*, 4 Ill. 333; *Osborne v. First Nat. Bank*, 26 Am. Rep. 289. And plaintiff in such an action is held to a rigid and close proof of the allegations as laid in pleading. 27 Am. & Eng. Enc. L. 1043; *Long Island Bank v. Boynton*, 105 N. Y. 656, 11 N. E. Rep. 837; *Wheaton v. Voorhis*, 53 How. Pr. 319; *Hethfield v. Newton*, 7 N. Y. Ch. 958, 3 Sandf. 564; *Vroom v. Ditmars*, 4 Paige, 526; *Taylor v. Morris*, 22 N. J. Eq. 606, 612; *Cloyes v. Thayer*, 3 Hill, 565; *Griggs v. Howe*, 31 Barb. 100; *Clarke v. Hastings*, 9 Grav. 64; *Hannas v. Hawek*, 24 N. J. Eq. 126; *Morris v. Taylor*, 22 N. J. Eq. 440; *New Jersey, etc. Co. v. Turner*, 14 N. J. Eq. 329; *Gould v. Horner*, 12 Barb. 601; *Frank v. Morris*,

57 Ill. 138, 11 Am. Rep. 4; *Farmers' etc. Bank v. Lang*, 22 Hun. 372. The respondent after his proofs were all in asked and obtained leave to amend his pleading to correspond with the proofs; this over appellant's objection, also after repeated objections to the evidence because of irreconcilable variance between the complaint and the proof. This was clearly erroneous. *Wheaton v. Morris*, 53 How. Pr. 325; *Cincinnati etc. R. Co. v. Bunnell*, 61 Ind. 184; *Rutty v. Co.*, 6 N. Y. Supp. 23; *Burnes v. Seligman*, 8 N. Y. Supp. 834; *Seymour v. Fisher*, 27 Pac. Rep. 240; *Robinson etc. Co. v. Johnson*, 7 Gray 423; *Southwick v. Bank*, 84 N. Y. 420; *Lawrence v. Knies*, 10 Johns. 140. The rule requiring strict pleading in usury cases is of no avail under the practice indulged in this case. *Lawrence v. Knies*, 10 Johns. 140; *Frank v. Morris*, 57 Ill. 138, 11 Am. Reps. 6. The pleading was not amended by service of the proposed amendments. *Caledonia Gold Min. Co. v. Noonan*, 3 Dak. 189, 14 N. W. Rep. 426. If Mrs. Lealos paid usury she should sue in her individual and not in her representative capacity to recover it back. The pleading and proof show that no usurious interest was paid by Lealos in his life time. § 5198 Rev. Stat. U. S.; *Bingham v. Marine Nat. Bank*, 41 Hun. 377; *Buckland v. Gallop*, 105 N. Y. 457. The plaintiff, suing in her capacity as executrix, cannot recover moneys due to her individually. *Lynch v. Davis*, 12 How. Pr. 323; *Stockton v. Chalmers*, 17 Pac. Rep. 229. The statute in this case creates the remedy and gives it to the person who pays the usurious interest only. Sec 5198, Rev. St. U. S. The right of Mrs. Lealos to recover usury paid by herself is personal to her if she has the right at all. *Buckingham v. Corning*, 91 N. Y. 525; 27 Am. & Eng. Enc. L. 949; *Stockton v. Chalmers*, 17 Pac. Rep. 229, 75 Cal. 332; *Blakely v. Newby*, 6 Munf. 64. Even if Mrs. Lealos used the money of the estate to pay the \$50 note, the suit to recover should be in her name as an individual. She cannot recover in her representative capacity. *Thompson v. Whitmarsh*, 100 N. Y. 35; *Buckland v. Gallup*, 105 N. Y. 453.

Bangs & Guthrie, for respondent.

The court properly allowed plaintiff to amend her complaint to correspond to the proofs. If defendant had proved to the court's satisfaction that it was misled by the amendment, the court might have imposed terms. § 5293 Rev. Codes; *Callin v. Gunter*, 11 N. Y. 368; *Tying v. Company*, 58 N. Y. 308; *Manning v. Tyler*, 21 N. Y. 567; 1 Enc. Pl. & Pr. 533. As to payments made by plaintiff in her representative capacity on the usurious contracts entered into by Edward Lealos prior to his death, she could sue either individually or as executrix. *Wolff v. Baird*, 123 Ill. 585; *Mowry v. Adams*, 14 Mass. 327; *Henderson Nat. Bank v. Alves*, 15 S. W. Rep. 132; 8 Enc. Pl. & Pr. 658; *Louisville Trust Co. v. Kentucky Nat. Bank*, 87 Fed. Rep. 143.

YOUNG, J. Mary Lealos prosecutes this action as the executrix of the last will and testament of her deceased husband, Edward

Lealos. The defendant is a national bank, organized under the laws of the United States, doing business in the City of Grand Forks, in this state. The plaintiff sues in her representative capacity, as executrix, to recover the penalty provided by section 5198, Rev. St. U. S., for taking usurious interest. She was successful in the District Court, and recovered a verdict for \$516.60. A motion for a new trial was made and overruled, and judgment was ordered and entered against the defendant for the amount of the verdict so returned. Defendant appeals from the judgment, and specifies here the same errors which were urged in its motion for a new trial in the District Court.

We will consider only one of appellant's assignments of error. It is in this language: "The court erred in overruling defendant's motion, made at the close of all the evidence in the case, and after plaintiff and defendant had both rested, to instruct the jury to find a verdict for the defendant." The motion referred to was as follows: "The defendant moves the court for a directed verdict upon the grounds and for the reasons: First, that the complaint does not state facts sufficient to constitute a cause of action; second, that the facts proved are not sufficient to constitute a cause of action against the defendant." This motion was overruled, and exception taken by the defendant. The motion to direct a verdict, which alone we will consider, is directed to the sufficiency of the complaint and the evidence, and involves a consideration of both. The plaintiff's complaint, in substance, alleges that she was the wife of Edward Lealos at the time of his death; that during his lifetime he made a will, naming her as executrix; that he died in November, 1896; that his will was proved on August 31, 1897, and letters testamentary were issued to her; that she then qualified, and entered upon the discharge of her duties as such executrix; that prior thereto, on November 30, 1895, the said Edward Lealos borrowed from the defendant the sum of \$980, which sum he agreed to repay on September 1, 1896; that the defendant charged 10 per cent. interest on said sum, and in addition to said 10 per cent. the further sum of \$70, with interest thereon at the same rate, all of which her said husband agreed to pay; that the aforesaid charges for interest were knowingly made by the defendant, with full knowledge that they constituted a higher rate of interest than is allowed by the laws of this state; "that thereafter, and on the 30th day of November, A. D. 1896, the plaintiff paid to the said defendant on account of said loan and the interest thereon the sum of \$155; that thereafter, and on September 2, 1897, the plaintiff paid to the defendant the sum of \$224.12, and on October 1, 1897, the sum of \$883.25; that by reason of the foregoing facts the plaintiff has paid to the defendant the sum of \$282.60 as and for interest on said loan so made as aforesaid,"—followed by a demand for judgment against the defendant for the sum of \$565.20, which is double the amount of the total interest so alleged to have been paid. From the foregoing allegations it will be seen—First, that

no portion of the sum borrowed, either principal or interest, was paid to the defendant by Edward Lealos during his lifetime; second, that the payment of \$155 on November 30, 1896, by Mary Lealos, was made by her individually, and not in a representative capacity, for it is alleged in the complaint that she did not qualify and enter upon her duties as executrix until August 31st of the next year; third, that the sums alleged to have been paid by her to the defendant in the fall of 1897, and after she had entered upon her duties as executrix, to-wit: \$224.12 on September 2, 1897, and \$883.25 on October 1, 1897, do not equal in amount the sum required to repay the money alleged to have been borrowed by her husband, with lawful interest, and that such payments so made do not, therefore, constitute the payment of usury by her in her representative capacity.

The undisputed evidence establishes the following facts, which are material to our inquiry on this motion: The loan made to Edward Lealos was \$1,000, and not \$980, as alleged in the complaint. The loan was negotiated and agreement as to interest made by Lealos in person. On November 30, 1895, the plaintiff and her said husband executed their joint notes, dated on that day, in favor of the defendant, as follows: One for \$1,000 and one for \$50, both due September 1, 1896, and both bearing 10 per cent interest from their date until paid. These notes were secured by a mortgage upon certain land located in Minnesota; also, by a chattel mortgage. All of the papers were prepared by the officers of the defendant bank, pursuant to the negotiations had exclusively with Edward Lealos, and were signed by the latter and his wife in the office of the bank, at Grand Forks. One thousand dollars, in the form of a check or draft, was turned over to Lealos by defendant, in plaintiff's presence, as soon as the papers were signed; and this check was cashed immediately by one Cunningham, to whom Lealos transferred it. No money was paid directly to plaintiff at that time, or at any other time, for the \$50 note. On October 16, 1896, Edward Lealos died. On November 30, 1896, the plaintiff arranged for an extension of the \$1,000 note for one year. This was secured by promising to pay 12 per cent. interest, the note so extended bearing but 10 per cent. On the same day she paid the \$50 note, which was signed by herself and husband jointly, and also paid all or a part of the interest due on the \$1,000 note. During the next fall she paid the balance remaining due on the \$1,000 note. There was no contention during the trial that the \$1,000 note was usurious, or that any usurious interest had been paid upon it. The whole case was made to turn upon the \$50 note. Plaintiff's counsel stipulated in the record "that the only question of usury in this case is that embraced in the \$50 note, which it is contended was given for usury or bonus upon the \$1,000 note. If the jury should find that the \$50 note was not given as we contend, we will consent that the court shall charge the jury for the defendant." And on this stipulation the case was submitted to the jury. The evidence of plaintiff on this point is based upon the fact that no money

was paid over on the \$50 note when the papers were signed, and also upon a certain statement which she testifies an officer of the bank made to her at the time in reference to this note, to the effect that it was theirs; that this was the way they did business. The president and cashier of the defendant bank, who had entire charge of this loan, and conducted the negotiations for making it, and who consummated it, testify that no usury was charged, either directly or indirectly; that the \$50 note was given to cover certain items which the defendant had already disbursed, or was thereafter to disburse, for Mr. Lealos, partly in connection with the examination and correction of the title to the land offered as security, and in part to pay a small balance due on a note which Mr. Lealos owed to William Deering & Co.; that these disbursements were made at the request of Lealos, and for his benefit; and that the note for \$50 was given to cover them, as an estimated amount, subject to correction by either party. In this connection Mr. Beecher, the president, testifies that he personally paid \$36.50, to take up the Deering note to which reference has been made, to their agent and collector, and produces the canceled note, indorsed, "Paid 12—2—95, Wood," which indorsement he says was put there by the agent in his presence, and on the date it bears, which is two days after the loan was made. They also testify to paying an attorney in Crookston \$10 for services in connection with the title to the land; also, the sum of \$14 to a firm of attorneys in Grand Forks for similar services; also, the sum of \$10 to one Salisbury for two trips to examine the land and attend to matters preliminary to the loan,—and that all these payments were made at the request of Lealos. This testimony is explicit, and Mrs. Lealos' testimony is not necessarily in conflict with it. If it were a question of fact before us for determination, we would have no hesitation in saying, under the evidence, that the \$50 note was not given for interest, but to cover the various items of expense paid and to be paid at the time the note was given.

Whether the testimony of the plaintiff is of sufficient weight to sustain a finding by the jury that the \$50 was given for usury is an altogether different question, and one which we need not discuss; for if we were to concede that this note was given without consideration, and is wholly for usurious interest, still we are of the opinion that plaintiff cannot recover in this action. The action is brought under the United States statutes. The sections or portions thereof which are important are as follows: Section 5197, Rev. St. U. S.: "Any association may take, receive, reserve and charge on any loan or discount made, or upon any note, bill of exchange or other evidence of debt, interest at the rate allowed by the laws of the state where the bank is located and no more." Section 5198 in part reads as follows: "The taking, receiving, reserving or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the

entire interest which the note, bill or other evidence of debt carries with it or which has been agreed to be paid thereon. In case the greater rate of interest has been paid the person by whom it has been paid, or his legal representatives, may recover back in an action in the nature of an action of debt, twice the amount of the interest thus paid, from the association taking or receiving the same." The foregoing section provides for a forfeiture of all interest when usurious interest has been merely stipulated for. *Bank v. Dushane*, 96 Pa. St. 340. But the right to sue to recover back (in other words, a cause of action) is not given until the usurious interest is paid, and the right of recovery arises at once upon such payment, in favor of the person making it, or his or her legal representatives, and to no other person. In *Stephens v. Bank*, 88 Pa. St. 157, it was said "that the remedy for the owner to recover it back is by a personal action. The right of action accrues the very instant the usury is paid," and this "whether the debt has been paid or not." *Bank v. Overholt*, 96 Pa. St. 327. "It is actual payment on the foot of the usurious contract, either in whole or in part, which consummates the usury, and from which the limitation of the action for the penalty commences to run." *Brown v. Bank*, 72 Pa. St. 209; *Shinkle v. Bank*, 22 Ohio St. 517; *Hintermister v. Bank*, 64 N. Y. 212. "Each payment of illegal interest must be regarded as a 'transaction' within the intent of the statute, and, when such payment is actually made or occurs, the two-years limitation commences to run as to that payment from that time." *Lynch v. Bank*, 22 W. Va. 554. In *Nichols v. Bellows*, 22 Vt. 585, it was held that "when separate securities are given for the usury, whether at the time of negotiating the loan or afterwards, and the usury when paid is applied upon such securities, the debtor is at liberty to treat such a payment as having no connection with the legal demand, and bring his action to recover it back." So, too, the same court, in *Davis v. Converse*, 35 Vt. 501, in discussing the application of payments, said: "That where the security is only for the principal and legal interest, and the unlawful interest is either put into a separate obligation, or rests in a verbal agreement, so that when paid it is not indorsed upon the note, but is paid as usury *eo nomine*, it is otherwise; and a right of action accrues immediately to sue and recover it back, though the lawful debt is still unpaid," citing *Grosv v. Albee*, 19 Vt. 540; *Nelson v. Cooley*, 20 Vt. 201; *Day v. Cummings*, 19 Vt. 496; *Nichols v. Bellows*, supra; and *Ward v. Whitney*, 32 Vt. 496. Likewise it is uniformly held that no one except the party who pays the usurious interest, or his legal representative, can recover it back. The plain language of the statute makes any other conclusion impossible. *Lezeur v. Bank*, 52 Md. 78; *Smith v. Bank*, 26 Ohio St. 152; *Scott v. Leary*, 34 Md. 395; *Hough v. Horsey*, 36 Md. 184. Further, it is settled law that when one of two joint makers of a note brings an action to recover the penalty provided by section 5198, Rev. St. U. S.,

he will be denied a recovery if it shall appear that the payment of usury was not made by him, but by his joint maker. *Timberlake v. Bank* (C. C.) 43 Fed. 231; *Bank v. Rowley* (Kan.) 34 Pac. Rep. 1049. Applying these tests to the complaint in this action, and to the evidence offered in support of it, has the plaintiff either pleaded or proved a cause of action? We are of the opinion that she has not. It is patent that the cause of action which plaintiff now attempts to assert had no existence during the lifetime of Edward Lealos, and is not the assertion of a right of action which he might have prosecuted; for he had no right of action, inasmuch as he made no payments to the defendant upon the alleged usurious loan of any sum, either of interest or principal. It is clear that and right of action to recover back which may have arisen has had its origin since the death of Edward Lealos. Whether an executrix who discharges the usurious obligations of the testator by paying them is to be considered as making the payments in an individual or representative capacity is a mooted question, which we will not discuss; for if it were conceded that all of the payments made by plaintiff since she became executrix were made in her representative capacity, and from the funds of the estate, and she has a right to sue for the penalty as executrix, yet no cause of action is established for a recovery by her in the character in which she sues. The one fact which is wholly fatal to a recovery by plaintiff as executrix is that as such she paid no usury to the defendant. This appears upon the face of the complaint, and more clearly in the evidence. The complaint shows that she paid \$155 individually before qualifying, and \$1,107.37 after becoming executrix. This last payment, made in the capacity in which she now sues, was not the payment of usury, as has been shown. Further, the evidence discloses that when she made the individual payment of \$155 she paid the \$50 note signed by herself and husband, and which it is stipulated contained all of the usury charged by or paid to the defendant. Upon that note her obligations were the same as her husband's, and her right to refuse to pay it, or to pay it and to recover the penalty, were the same as his. She chose to pay it. At the moment that payment was made, the right to recover the penalty provided by section 5198, Rev. St. U. S., accrued to her personally, as the person making the payment, and not to her husband or his legal representatives. This case is somewhat similar to *Bank v. Rowley*, supra, which was an action by Rowley to recover the penalty for usury paid to the bank upon a note signed jointly by him and one Groves, and was brought under the same statute. The payment was made by Groves, and for that reason a recovery was denied to Rowley. The court said: "The bank, having charged and collected usurious interest, has become liable for double the amount of the illegal interest that was paid. The liability, however, is to the person who paid it. The penalty can only be enforced in the manner and under the circumstances provided in the act of congress which provides that

the right of recovery rests only in 'the person by whom it has been paid or his legal representatives.' From the evidence it appears that Rowley and Groves were joint makers of the note upon which the illegal interest was charged and paid. While the loan was made to Rowley, both of them were liable upon the note; and the bank, at its option, might have brought an action against one or both of them. The court has found that Groves, and not Rowley, paid the illegal interest, and that the payments were made by Groves out of his own money. The money having been paid by him, the liability arises in his favor, and no recovery can be had except by him or his legal representatives. * * * Under the facts of this case, a clear right of recovery is shown to be in Groves, and, as he is not a party to this action, he would not be bound by any judgment that was given therein. The right of action is in the person by whom the money is paid, and it has been held, under the same statute, that the joint maker of a note on which illegal interest is charged cannot recover the penalty from the bank, where the illegal interest was paid by the other maker. *Timberlake v. Bank*, (C. C.) 43 Fed Rep. 231."

Our conclusion is that upon the face of the complaint, and under the evidence, no right of action to recover the penalty provided by section 5198, Rev. St. U. S., ever existed in the plaintiff in her representative capacity as executrix, and that the right to sue for such penalty is shown to have been in her individually. The defendant's motion should therefore have been granted upon both of the grounds upon which it was based. The judgment of the District Court is reversed, and that court is directed to enter a judgment dismissing the action. All concur.

(81 N. W. Rep. 56.)

EDWIN H. MCHENRY *et al*, vs. WM. BRETT.

Opinion filed November 11, 1899.

Tax Sale—Exempt Property—Rights of Purchaser.

Where property was exempt from taxation by a county, any pretended tax levied thereon by the county was absolutely void; and where such property was sold at tax sale for such void tax under the revenue law as it stood in Comp. Laws 1887, the purchaser acquired no lien whatever on the property, and if he voluntarily paid subsequent valid taxes thereon, he cannot recover the amounts so paid from the owner of the property.

Appeal from District Court, LaMoure County; *Glaspell, J*

Action by Edwin H. McHenry and others, receivers of the Northern Pacific Railroad Company, against William Brett. Judgment for plaintiffs. Defendant appeals.

Affirmed.

C. W. Davis and *W. F. Mason*, for appellant.

At the time of appellant's purchase at tax sale section 1643 Comp.

Laws, was in full force and effect. The act of purchasing constituted a contract the obligation of which could not be impaired by subsequent legislation. *Cooley on Tax'n*, 2d Ed. 544-545; *Fleming v. Roverud*, 30 Minn. 273, 15 N. W. Rep. 119; *State v. Foley*, 30 Minn. 350, 15 N. W. Rep. 375; *Corbin v. Commis'srs*, 1 McCrary, 521; *St. Louis etc. R. Co. v. Alexander*, 49 Ark. 190, 4 S. W. Rep. 753; *Morgan v. Miami*, 27 Kan. 89; *Robinson v. Howe*, 13 Wis. 341; *State v. Hundhausen*, 23 Wis. 508; *State v. Fylpaa*, 3 S. D. 586, 54 N. W. Rep. 599; *Sturges v. Crowninshield*, 4 Wheat. 122 and n., 4 L. Ed. 529; *Von Baumbach v. Bade*, 9 Wis. 559. Brett can recover for valid taxes paid by him subsequent to the sale, even though he cannot recover the taxes for which the sale was made. *Merriam v. Hemple*, 17 Neb. 345, 22 N. W. Rep. 775; *Harber v. Sexton*, 65 Ia. 212, 23 N. W. Rep. 635; *Coonradt v. Myers*, 31 Kan. 30, 2 Pac. Rep. 858.

James B. Kerr and *J. B. McNamee*, for respondents.

The taxes of 1888 were illegally assessed and Brett got nothing by his purchase of the land under sale of this year's tax. *McHenry v. Alford*, 168 U. S. 651, 18 S. C. Rep. 242. The appellant Brett could not and did not acquire any lien by virtue of his purchase at tax sale for the 1888 tax. There was no legal sale for taxes, therefore he does not come within the terms of §§ 1625 and 1635, Comp. Laws. The doctrine of subrogation is the foundation of the right which the various legislatures have seen fit to confer upon the purchaser at tax sales. *Merriam v. Hemple*, 22 N. W. Rep. 775; *Merrill v. Wright*, 59 N. W. Rep. 787; *Stegeman v. Faulkner*, 60 N. W. Rep. 319; *Ledwich v. Connell*, 66 N. W. Rep. 1108. The theory of the law is that the purchaser succeeds to the lien of the state. *Crecelius v. Mann*, 84 Ind. 147. The equitable doctrine of subrogation is never invoked in favor of a mere volunteer who discharges the debt or duty of another in the absence of an agreement or of some duty imposed upon him by law or contract or of some interest in the subject matter. 27 N. W. Rep. 538 and n.; 24 Am. & Eng. Enc. L. 284. Brett being a stranger to the title, a construction of the statute which would allow him to pay the taxes of 1889 and acquire rights thereby would be in effect a sale for taxes before delinquency and without notice. The court will hesitate to give this statute such a construction as will contemplate doing indirectly what the policy of the law would not permit to be done directly. *Sprague v. Roverud*, 26 N. W. Rep. 603; *Barke v. Early*, 33 N. W. Rep. 678; *Roberts v. Deeds*, 57 Ia. 320, 10 N. W. Rep. 740. The tax purchaser must succeed to the lien of the state or county before he acquires the right to pay subsequent taxes as against the owner. *Thode v. Spafford*, 65 Ia. 204, 17 N. W. Rep. 561; *Everett v. Beebe*, 37 Ia. 452; *Early v. Whittingham*, 43 Ia. 162; *Barber v. Evans*, 6 N. W. Rep. 49; *Bronson v. McDougal*, 7 S. W. Rep. 591; *Simpson v. Edmiston*, 23 W. Va. 679. The descriptions, in the 1889 assessment roll are insufficient. *O'Neil v.*

Tyler, 3 N. D. 47; *Power v. Larabee*, 2 N. D. 141. In no event can penalties or interest be allowed. *Wells County v. McHenry*, 74 N. W. Rep. 241, 7 N. D. 246.

BARTHOLOMEW, C. J. For the purposes of the questions involved in this appeal, it may be said that the plaintiffs, as the receivers of the Northern Pacific Railroad Company, brought this action to cancel tax deeds upon certain lands situate in LaMoure county, in this state, which said lands formed a part of the place lands in the original grant of lands by congress to said railroad company, and which said lands the said County of LaMoure, by its proper officials, sold to the defendant, William Brett, at the tax sale in 1889, for the alleged taxes that had been assessed and levied thereon for the year 1888. Subsequently deeds were issued upon such sale to said defendant. It has been judicially determined that said lands were not subject to taxation by the county in said year. *McHenry v. Alford*, 168 U. S. 651, 18 Sup. Ct. 242, 42 L. Ed. 614; *Wells Co. v. McHenry*, 7 N. D. 246, 74 N. W. Rep. 241. This is conceded by said defendant, and the cancellation of said deeds is not now resisted. But the said defendant set forth in his answer, by way of counterclaim, that in January, 1890, he paid the taxes upon said lands that had been assessed and levied thereon for the year 1889, setting forth the amounts so paid; and he asks that judgment be rendered in his favor, and against plaintiffs, for the amounts so paid, with interest, penalties, and costs. It will thus appear that the single question presented for our determination is whether or not a party who purchases land at a tax sale for an unwarranted and void tax can pay subsequent valid taxes thereon, and recover from the owner the amount of the valid tax subsequently paid by him. The trial court held against the proposition, and defendant, Brett, appeals.

At the time of the sale in question, section 1643, Comp. Laws, was in force, which declares that, whenever an action is brought to set aside a tax deed, "the true and just amount of taxes due upon such property or by such person must be ascertained and judgment must be rendered and given therefor against the taxpayer." It is doubtless true, as contended by counsel, that whatever rights then accrued to the purchaser by virtue of said statute, and other then-existing statutes in *pari materia*, assumed the form of contract rights, and could not be destroyed by subsequent legislation. *Roberts v. Bank*, 8 N. D. 504, 79 N. W. Rep. 1049, and cases cited. *Roberts* 1626, Comp. Laws, contains this language: "The purchaser acquires the lien of the tax on the land and if he subsequently pay any taxes levied on the same whether levied for any year or years previous or subsequent to such sale, he shall have the same lien for them, and may add them to the amount paid by him in the purchase." And section 1635 declares that "the owner or occupant of any land sold for taxes" may redeem the same within a specified time by paying the amount for which the sale was made, with

certain interest thereon, and all subsequent taxes paid, with the same rate of interest thereon. To support his position that under these provisions he is entitled to judgment for the amount paid on the 1889 taxes, appellant cites the case of *Merriam v. Hemple*, 17 Neb. 345, 22 N. W. Rep. 775. Perhaps this case is an authority for appellant. As it is reported, we are not entirely certain. There a sale was set aside, but the purchaser was allowed to recover for subsequent taxes paid. Whether the court regarded the sale as invalid by reason of irregularities, or because the tax upon which it was based was void, we are not clear. It is certain the court did not intend to hold that a sale under a void tax could transfer or create any lien, because the court say: "The trial court found that the sale for the taxes of 1871 was a void sale. Such was, perhaps, the fact. But that fact could not destroy the lien of the purchaser for the taxes paid by him at such sale, if the taxes were valid, and the sale void on account of the irregularities of the revenue officers above the assessor." The court immediately adds: "Neither could it destroy the lien for subsequent taxes legally levied, if the taxes for the year for which the real estate was sold were void." Abstractly, this latter statement is strictly correct. A sale under a void tax could not affect the lien of the county under subsequent valid taxes; but we could not hold, under our statutes, that a party having no lien whatever on the land to protect could voluntarily pay the subsequent taxes, and thereby acquire the lien of the county, and compel the property owner to accept him as tax collector. Appellant also cites *Coonradt v. Myers*, 31 Kan. 30, 2 Pac. Rep. 858. But the question here involved was not raised or mentioned in that case. There the party whose tax title failed had paid subsequent taxes for eight years. The case turned on a three-years statute of limitations. The lower court only allowed a recovery for taxes paid within three years prior to the date of bringing suit. That was reversed, and some of the reasoning of the court supports appellant. The court places the recovery of subsequent taxes paid upon the same ground as recovery for improvements under the occupying claimant's act, and says, in effect, that nothing can be recovered by way of improvements until the claimant's title is declared defective; then the value of all improvements must be allowed. So, as to subsequent taxes paid, nothing can be recovered therefor until the title under the purchase is declared defective; then all that has been paid must be recovered. But we venture to suggest that nothing can be recovered under the occupying claimant's act until the party brings himself within the terms of the act, and likewise nothing can be recovered by way of subsequent taxes paid until the party brings himself within the terms of the statutes authorizing such recovery. This court held in *Budge v. City of Grand Forks*, 1 N. D. 309, 47 N. W. Rep. 390, 10 L. R. A. 165, and *Tyler v. Cass Co.*, 1 N. D. 369, 48 N. W. Rep. 232, that the rule of *caveat emptor* applied to a purchaser at a tax sale,

in all its fullness. He takes his chances. If he be not within the law, he is bound, at his own peril, to know it. On this point, what were appellant's rights under the statute? The case of *McHenry v. Alford*, supra, followed by this court in *Wells Co. v. McHenry*, supra, declared that these lands were exempt from taxation by the county for the year 1888. Being exempt,—the county being without power to tax them,—the pretended tax was a nullity. It constituted no lien in favor of the county. Section 1626, Comp. Laws, says the purchaser acquires the lien of the tax upon the land. But in this case, there being no lien, none passed by the sale. This, under the rule of *caveat emptor*, the purchaser was bound to know. He knew he was a stranger to the title. The section further says that, if he subsequently pay any taxes, he shall have the same lien for them. Now, it would seem to be clear and manifest intent of this language that the purchaser could pay subsequent taxes and acquire a lien only when he had acquired a lien by his prior purchase. There is nothing whatever in section 1643 that conflicts with this. That section relates to an attack upon a tax or tax sale. If the tax be upheld in part, or if the sale be defeated upon grounds that do not affect the validity of the tax, the court is required to render judgment for the true amount of tax due upon the property. Of course, that provision could have no application where the tax was void *ab initio*, as in this case. We think the purpose of the statutes quoted was to enable a purchaser at tax sale to protect his lien and increase his profits, and thereby present another inducement to bid at tax sales. It would, in our view, be highly unjust to permit one who has no lien—a stranger to the title—to step in and pay taxes before they became delinquent, as was done in this case, and thereby throw upon the property owner the burden that would accrue upon a tax sale. We cannot so construe the statute. We believe the right to recover subsequent taxes paid must be based upon some lien acquired by a prior purchase, and in this holding we are supported by the following authorities: *Barke v. Early*, 72 Iowa, 273, 33 N. W. Rep. 677; *Roberts v. Deeds*, 57 Iowa, 320, 10 N. W. Rep. 740; *Barber v. Evans*, 27 Minn. 92, 6 N. W. Rep. 445; *Broxson v. McDougal*, 70 Tex. 64, 7 S. W. Rep. 591; *Early v. Whittingham*, 43 Iowa, 162; *Croskery v. Busch* (Mich.) 74 N. W. Rep. 464.

These views lead to an affirmance of the decree in this case, but, before closing the opinion, it is proper to say that the writer hereof, while speaking of this same general subject, used language in *Roberts v. Bank*, 8 N. D. 504, 79 N. W. Rep. 1049, which is perhaps inadmissible. It was there said that since the passage of chapter 126, Laws 1897, a tax-sale purchaser, whose purchase was held invalid, must in all cases look to the county for reimbursement. It was said that the matter pertained to the remedy only, and was subject to legislative control. A further examination of the statute shows that such statement was incorrect. The statute does not

pertain to the remedy exclusively. It in part destroys the right, as the recovery under that law, while identical with the recovery under chapter 132, Laws 1890, is more limited than the recovery under the law as it existed prior to 1890. And, in so far as the language used gave to the law of 1897 unlimited retrospective operation, it was unwarranted, and is here qualified. The judgment and decree of the District Court are adopted by this court, and in all things affirmed. All concur.

(81 N. W. Rep. 65.)

NORTHERN PACIFIC RAILWAY CO. *vs.* WM. A. MCCLURE, *et al.*

Opinion filed November 14, 1899.

Railroads—Fires—Liability—Exemption—Leases—Covenant—Assignment

On October 1, 1892, the Northern Pacific Railroad Company leased a portion of its right of way to the defendants for warehouse purposes. The defendants covenanted in the lease that, in addition to paying a nominal rent, they would save and hold the lessor harmless from losses arising out of the destruction of property on the leased premises by fires set by the lessor's engines. Said lease contained a stipulation that all of its covenants and conditions should be binding upon the assigns of both parties to it. On August 18, 1896, the Northern Pacific Railroad Company transferred all of its property, including the premises demised and the lease, to the Northern Pacific Railway Company, the plaintiff in this action. The lessees consented to such transfer, and attorned to the plaintiff as their landlord under said lease. *Held*, in an action by plaintiff to recover the amount of a loss suffered by it as a result of a fire set by its engine, that the covenants to save harmless passed to plaintiff, and it is accordingly entitled to recover thereon.

Covenants Which Run with the Land—Not Named in Statutory Enumeration.

Sections 3784-3787, Rev. Codes, which declare what covenants in grants of real property run with the land, and designate a number of such covenants by name, construed; and *held*, that said sections do not confine covenants which run with the land to those specifically named, but that such covenants as by reason of their character are within the meaning of said sections also run with the land.

Appeal from District Court, Cass County; *Pollock, J.*

Action by the Northern Pacific Railway Company against William A. McClure and others to recover indemnity, under a lease, for liability for property destroyed by fire. From a judgment in favor of plaintiff, on an order overruling a demurrer to the complaint, defendants appeal.

Affirmed.

Newman, Spalding & Stambaugh, for appellant.

There is no privity of contract between the defendants and the Northern Pacific Railway Company, and no privity of estate which will allow the company to recover any loss which it has sustained.

The covenant does not run with the land. §§ 3784, 3785, 3786 and 3787, Rev. Codes; Taylor's L. & T. § 260; 1 Washb. Real Prop. Sec. 4, Subd. 10 and 11; *Newman v. Wells*, 17 Wend. 145; *Morse v. Garner*, 47 Am. Dec. 565; *Countryman v. Dick*, 13 Abb. New Cases, 114, n; *Carpenter v. Ins. Co.*, 15 Pet. 503; *Columbia Ins. Co. v. Lawrence*, 10 Pet. 572. The provision in the writing is a contract of insurance, §§ 4441 and 4487, Rev. Codes, and a provision as a contract of insurance or indemnity does not run with the land, but is a strictly personal covenant. *Dunlap v. Avery*, 89 N. Y. 599; *Reid v. McCrum*, 91 N. Y. 412; *Hursha v. Reid*, 45 N. Y. 419; *Scott v. McMillan*, 76 N. Y. 141; *Cromwell v. Ins. Co.*, 44 N. Y. 47; *Hastings v. Ins. Co.*, 73 N. Y. 152; Sec. 4489, Rev. Codes.

Ball, Watson & Maclay, for respondent.

All the covenants and agreements which were wrapped up and involved in the use of the premises and the purposes for which they were leased and which were part of the consideration upon which the lease was based, became operative in favor of the railway company upon the attornment to it by the lessees. Abbott's Law Dict. Subj. "Attornment"; *Cornish v. Searell*, 8 B. & C. 471; *Doe v. Smith*, 8 Ad. & E. 255; *Austin v. Ahern*, 61 N. Y. 6 & 15. Upon the reorganization of a corporation the new corporation may succeed to the rights of its predecessor. In such case an assignment is a matter of form and not of substance. *New York Bank Note Co. v. Bank Note Co.*, 50 N. Y. Supp. 1093-1099. The covenant runs with the land and is operative in favor of every owner of the railroad while the lease remains in existence. *Vyvyan v. Arthur*, 1 B. & C. 410; *Dunbar v. Jumper*, 2 Yeates, 74; *Brandford v. Blair*, 4 Atl. Rep. 218; *Railway v. Fisher*, 24 N. E. Rep. 756; *Bronson v. Coffin*, 108 Mass. 175; *Railway v. Bosworth*, 14 N. E. Rep. 533; *State v. McPherson*, 40 Atl. Rep. 630; *Williams v. Earle*, L. R. 3 Q. B. 200; *Tatem v. Chaplin*, 2 H. Bl. 133; *Torrey v. Wallace*, 3 Cush. 442; *Savage v. Mason*, 3 Cush. 500; *Aiken v. Railway*, 26 Barb. 289; Tiedeman on Real Property, § 190; *Van Rensselaer v. Smith*, 27 Barb. 146-174. Whether the covenant is such as would run with the land or not it vested in the plaintiff as the assignee of the railroad company by virtue of sections 3366 and 3367, Revised Codes. Under this statute these covenants will be construed as running with the land. *Winterfield v. Stauss*, 24 Wis. 394-403; *State v. McPherson*, 40 Atl. Rep. 630; *State v. Idler*, 24 Atl. Rep. 554; *Barnes v. Trust Co.* 48 N. E. Rep. 31.

YOUNG, J. In this case a demurrer to the complaint was interposed by defendants' counsel upon the ground that it does not state facts sufficient to constitute a cause of action. The demurrer was overruled by the trial court, and, defendants having elected to stand upon their demurrer, judgment was ordered and entered for the plaintiff for the relief demanded. The defendants appeal from the judgment, and submit for review the correctness of the court's

order overruling the demurrer, and that question only. If that ruling is sustained, the judgment must be affirmed. If not, it will be reversed. By interposing the demurrer, the defendants admit the truth of all facts alleged in the complaint which are well pleaded, but challenge their sufficiency in law to create a cause of action against them in favor of the plaintiff. The material facts so admitted by the demurrer are concisely stated in the brief of respondent's counsel, from which we will quote. They are these: "On October 1, 1892, the defendants leased from the Northern Pacific Railroad Company part of its right of way at Richardton, North Dakota, adjacent to its tracks, for a term of five years. Such leasing was for the benefit and advantage of both parties, through the facilities furnished to defendants for carrying on their business of storing and shipping merchandise; and to the railroad company, by reason of the increased traffic acquired thereby for its road. Said lease was given in consideration of a nominal rent, and in further consideration of the covenant, among others, on the part of the lessees, that they would and did assume all risks of loss or damage to any property upon the leased premises, and that they would save harmless the lessor from all damages or claims for losses or injury suffered to said property, by whomsoever claimed. Afterwards, and during the continuance of the lease, said Northern Pacific Railroad Company was reorganized under the name of the plaintiff, Northern Pacific Railway Company; and all the property of the railroad company, including the land and lease in question, was on the 18th day of August, 1896, conveyed and transferred to the Northern Pacific Railway Company. Thereupon said plaintiff railway company operated said line of railroad, and the control and management of said road thereafter was in the same hands, substantially, as before the reorganization; and the personnel of the operating and engineering departments, and the method of its operation and management, were thereafter substantially the same as they had been while the road was operated under the name of the Northern Pacific Railroad Company. The lessees consented to the transfer and conveyance from the railroad company to the railway company, and attorned to the plaintiff railway company as their landlord; and after such transfer they accepted and retained all the rights, benefits, and privileges conferred upon them by the lease, as lessees thereunder; and the lease was, by its express terms, binding upon the railway company, as the successor and assign of the railroad company. * * * The lessees permitted the McCormick Harvesting Machine Company to store their property upon the leased premises, and on April 26, 1897, during the continuance of the lease, such property was accidentally destroyed by fire. The machine company sued the plaintiff to recover damages for the destruction of said property, and the plaintiff duly notified and requested the defendant lessees to defend the action, but they failed to do so. The plaintiff thereupon defended the action, and did all

in its power to protect its own rights and those of the defendants; but judgment was duly recovered against it, and paid by it to the machine company."

This action is brought, upon the indemnity covenant in the lease from the Northern Pacific Railroad Company to the defendants, to recover the amount disbursed by plaintiff in paying the judgment referred to; also, the costs incurred in defending the action wherein the judgment was rendered. In the lease in question the Northern Pacific Railroad Company is named as the first party, and the defendants as second parties. The portion of said lease upon which plaintiff relies is in the following language: "The said parties of the second part shall, and do hereby, assume all risks of loss, damage, or destruction of any property, building or contents, coal, lumber, or material, that may be upon, or in proximity to, the grounds included in this lease, by the parties of the second part or by any other party, occasioned by fire or sparks from locomotive engines, or other cause, or by neglect, carelessness, or misconduct of any person in the employment or service of the said party of the first part; it being the intent hereof that the said parties of the second part shall and do release, forever discharge, save and hold harmless, the said party of the first part from all damages and claims for losses or injury suffered or sustained, or that may be suffered or sustained, to said property, or to any other property on or near said demised premises." No question is raised as to the validity of the contract of lease as a whole, or as to the foregoing covenant. On the contrary, counsel for defendants expressly concede in their brief that the agreement of defendants to save and hold the lessor harmless is a binding agreement, and that the lessor might have successfully maintained an action against them for recovery thereon for a breach of the same. But it is contended that this covenant did not pass to the plaintiff, as the assign and grantee of the lessor, and that it cannot, therefore, recover thereon. Defendant's whole contention is based upon the last proposition. Did the covenant to save the lessor harmless against claims for damages for losses of property upon the demised premises pass to the new corporation, the Northern Pacific Railway Company, the plaintiff in this action? If this covenant of the lessees did pass to the plaintiff by the transfer of the lease to it by the lessor, or by the grant to it of the right of way which is the subject of the lease, then it is patent that plaintiff has stated a cause of action entitling it to the relief demanded; for it is sufficiently alleged that it has suffered such a loss as entitles it to a recovery under the covenant referred to. The loss by fire occurred about eight months after the transfer of the land and lease by the old corporation to the plaintiff.

At early common law a lease was considered like any other agreement or chose in action, and was not assignable so as to give the assignee an action against the tenant. Later the injustice which this rule caused was partially corrected by the enactment of 32

Hen. VIII, c. 34, § 1, declaring that the assignee of the reversion should become invested with the rents. It was thereafter held that the assignment of the reversion created a privity of estate between the assignee and the tenant; also, that a subsequent attornment of the tenant to the assignee created a privity of contract between the tenant and the assignee, which authorized the latter to sue for rent in his own name. *Fisher v. Deering*, 60 Ill. 114; *Barnes v. Trust Co.* (Ill. Sup.) 48 N. E. Rep. 31. In this state some of the uncertainty as to the rights and remedies of grantees and devisees of a lessor against tenants of the latter is removed by direct legislation. Section 3366, Rev. Codes, provides that "a person to whom any real property is transferred or devised upon which rent has been reserved, or to whom any such rent is transferred, is entitled to the same remedies for recovery of rent, for non-performance of any of the terms of the lease, or for any waste or cause for forfeiture as his grantor or devisor might have had." It is also provided in section 3367, Id., that the lessor has the same remedies against the assignee of the lessee for the breach of an agreement in the lease as he has against the immediate lessee; also, that the lessee has the same remedies against the assignee of the lessor which he may have had against the lessor himself, except upon covenants against incumbrances, or relating to the title or possession of the premises. Section 3543 also provides that "grants of rents or reversion or of remainders are good and effectual without attornment of tenants, but no tenant who before notice of the grant shall have paid rent to the grantor must suffer any damage thereby." Most of the states now have similar statutes. The Supreme Court of Wisconsin, in construing their statute (which is substantially like sections 3366 and 3367, supra, and wholly so, in effect, when the two sections are construed together) in *Winterfield v. Stauss*, 24 Wis. 394, said: "The effect of this statute is to cause the covenants entered into on the part of the lessee, or the conditions upon which he holds, to run with the land, and to pass by conveyance or assignment to the assignee of the lessor, or of the reversion, so that such assignee may at once, and without attornment by the lessee, take advantage of any covenant or condition contained in the lease, the same as the lessor himself might have done. The consent of the lessee, or what was called 'attorning,' is no longer required, as at the common law, for this purpose; but the assignee succeeds immediately to all the rights and remedies which the lessor had, or might have had if no assignment had been made. In other words, the assignee becomes himself the landlord, standing in the place of the lessor, and enjoying all his rights and privileges under and by virtue of the lease. * * * The assignee here has all the rights and remedies of the lessor. He becomes the lessor by virtue of the assignment, and stands in the relation of landlord to the tenant in possession under the lease." We think the interpretation of the Wisconsin court, with the exception hereafter noted, is entirely

sound, and evidently conforms to the legislative intention in enacting the remedial statutes, which was to place the assignees of both lessors and lessees in the same position relative to the lease which their assignors had, and to give to them the same rights and the same remedies.

Counsel for defendants contend, however, that plaintiff cannot recover upon the covenant in question, because there is no privity of estate or contract between it and the defendants. That privity both of contract and estate existed by virtue of the transfer of the lease and grant of the premises to the plaintiff by the lessor is shown by the case of *Fisher v. Deering*, 60 Ill. 114; also, *Winterfield v. Stauss*, supra; also by the weight of authority. *Hunt v. Thompson*, 2 Allen, 341; *Pfaff v. Golden*, 126 Mass. 402; *Kendall v. Carland*, 5 Cush. 74; *Scott v. Lunt's Adm'r*, 7 Pet. 596, 8 L. Ed. 797; *Abercrombie v. Redpath*, 1 Iowa, 111; *Crosby v. Loop*, 13 Ill. 625; *Dixon v. Niccolls*, 39 Ill. 372; *Same v. Buell*, 21 Ill. 202; *Hatfield v. Lockwood*, 18 Iowa, 296; *Page v. Esty*, 54 Me. 319; *Moffat v. Smith*, 4 N. Y. 126; *Glover v. Wilson*, 2 Barb. 264; *Port v. Jackson*, 17 Johns. 239; *Morris v. Niles*, 12 Abb. Prac. 103; *Bonetti v. Treat* (Cal.) 27 Pac. Rep. 612, 14 L. R. A. 151; *Watson v. Idler* (N. J. Sup.) 24 Atl. Rep. 554.

Counsel has called our attention to sections 3784-3787, Rev. Codes, in support of their contention that the covenant to indemnify did not pass to plaintiff. They are as follows:

"Section 3784. Certain covenants contained in grants of estates of real property are appurtenant to such estates and pass with them so as to bind the assigns of the covenantor and to vest in the assigns of the covenantee in the same manner as if they had personally entered into them. Such covenants are said to run with the land.

"Sec. 3785. The only covenants which run with the land are those specified in this article and those which are incident thereto.

"Sec. 3786. Every covenant contained in a grant of an estate in real property which is made for the direct benefit of the property or some part of it then in existence runs with the land.

"Sec. 3787. The last section includes covenants of warranty, for quiet enjoyment or for further assurance on the part of the grantor, and covenants for the payment of rent, or of taxes or assessments upon the land on the part of the grantee."

We do not think these sections aid counsel's contention, for an examination of them makes it obvious that the legislature did not undertake to enumerate by name all of the particular covenants which run with the land, and pass to assigns and grantees. These sections, taken together, have a twofold purpose: They declare the effect of covenants which run with the land to be as binding upon the assigns of the covenantor and covenantee as if they had been personally made by them. In addition, they declare the test as to what constitutes a covenant which runs with the land, by the

aid of which courts must determine in each particular case whether a covenant in question comes within the statute. At common law the principle which determined whether a covenant run with the land required that it be, in a sense, inherent in the estate demised, or connected with it, or that it touched the land or its value, or the value of the reversion or of the term, or went to fix the amount of the rent. See *Norman v. Wells*, 17 Wend. 136; *Allen v. Culver*, 3 Denio, 284; *Dolph v. White*, 12 N. Y. 296. Certainly our statute does not restrict us to narrower limits, for its express language extends to covenants "appurtenant to such estates," covenants "for the direct benefit of the property or some part of it then in existence," and those which "are incidental thereto." The conclusion cannot be drawn that because section 3787 enumerates five of the most common covenants, namely, of warranty, for quiet enjoyment, for further assurance, for payment of rent, and for payment of taxes and assessments, as running with the land, that all others are excluded. The language of the section itself forbids such a construction, for it shows that these particular covenants are merely included among those not mentioned. Further, it is not conceivable that the legislature intended to limit such covenants to those mentioned, and exclude the great number which have for generations been held as covenants running with the land, and as binding assigns. Among those, we name but a few: Covenants to repair. *Shelby v. Hearne*, 6 Yerg. 512; *Allen v. Culver*, 3 Denio, 284. To pay for improvements. *Ecke v. Fetzer*, 65 Wis. 55, 26 N. W. Rep. 266. Not to erect and operate a rival mill. *Norman v. Wells*, 17 Wend. 136. To leave in repair. *Demarest v. Willard*, 8 Cow. 206; *Myers v. Burns*, 33 Barb. 401. To maintaining existing fences. *Hartung v. Witte*, 59 Wis. 285, 18 N. W. Rep. 175; *Kellogg v. Robinson*, 6 Vt. 276. For right of ingress and egress to and from a building. *Bush v. Calis*, 1 Show. 389. Not to assign or underlet. *Williams v. Earle*, 9 Best & S. 740. Not to erect a building in front of the demised premises. *Trustees v. Cowen*, 4 Paige, 510. Not to plow or cultivate in a certain manner. *Cockson v. Cock*, Cro. Jac. 125. To use land in a husbandlike manner, and leave it in like condition. *Walsh v. Watson*, Esp. N. P. 295. To manure land each year. — *v. Davis*, M. S. M. T., 42 Geo. III. To leave land with certain crops planted. *Hooper v. Clark*, 8 Best & S. 150. To reside on the premises during the term. *Taltem v. Chaplin*, 2 H. Bl. 133. Not to carry on particular trades on the premises. *Barron v. Richard*, 3 Edw. Ch. 96. To erect only buildings of a certain kind, and use them only for a specified purpose. *St. Andrew's Lutheran Church's Appeal*, 67 Pa. St. 512. To erect buildings on the premises. *Fisher v. Lewis*, 3 Pa. Law J. 73. To erect and maintain an adjoining fence. *Bronson v. Coffin*, 108 Mass. 175. To insure buildings when the money is to be used to rebuild. *Thomas' Adm'rs v. Von Kapff's Ex'rs*, 6 Gill & J. 372. The cases, it will be seen, are as various as the particular covenants upon which they are based. Likewise in the future

each particular case must be determined by itself, by the application of the principle declared by common law or by statutes, where they exist.

Our conclusion is that the covenant in question in the case at bar passed to the plaintiff, and invested him with the same rights thereunder which the old corporation had. In reaching this conclusion, we are not controlled by the fact simply that it is a covenant contained in a lease, for, in our opinion, that is not enough; and in this respect we think the language of the Wisconsin court in *Winterfield v. Stauss*, supra, is too broad, if it was intended to mean that all covenants of the lessee with the lessor passed to the assigns of the latter, regardless of the nature of the covenants. For it must be conceded that covenants and stipulations may be, and often are, inserted, which are wholly foreign to the subject-matter of the lease, and, while they are binding between the immediate parties thereto, are so disconnected with the estate that they do not pass by assignment, but remain as covenants between the original parties. But the covenant here involved is not of that nature. We think it is a covenant directly connected with the estate, and within the meaning of our statutes. While it is probably true that it is not an agreement to pay "rent," as that word is commonly understood, yet it has to do with determining the compensation which the lessor is to receive for the use of the premises. It is perfectly apparent that the agreement to pay \$10 per year as rent was merely a nominal sum, and that the real consideration for the use of the lands was this particular agreement that the lessor should not suffer loss from damage suits brought to recover for the destruction of property upon the premises so leased to the defendants. If counsel's contention were true, that this covenant did not pass, then the only obligation the defendants would owe the plaintiff for the use of the property is the payment of the nominal rent of \$10 per year, and that would be the extent of their liability; for it is clear that they can incur no liability to the old corporation, in fact or in law. For, by reason of the sale of all of its property to the plaintiff, it cannot be the moving agent in negligently setting fire to property on the premises from which alone the liability would arise. Further, none of the covenants of the lease have been binding upon the lessor since August 18, 1896; for on that day all of its rights were transferred to the plaintiff, and the defendants attorned to it as their landlord under the lease in question. The legal effect of these acts was a surrender of all of the rights which the lessor had in the lease to the plaintiff which were connected with the estate, and an assumption of all of the obligations therein by the lessee as thereafter binding upon him in favor of his new landlord. Moreover, this was in accordance with the intention of the original parties, and their express agreement in the lease, contained in the following language: "It is further mutually covenanted and agreed by and between the said parties hereto that the covenants, agreements, and conditions herein contained shall be binding upon the executors, administrators, and

assigns of the said parties of the second part, and the successors and assigns of the said party of the first part." The covenants and conditions which are thus expressly agreed to be binding upon the assigns of the lessor must be considered as binding upon the lessee, also, in order to effect mutuality; and such, without doubt, was the intention of the parties in making the stipulation. It would also seem that the covenant in question was one which directly affected the value of the property. It certainly would during the five years in which the lease run. For, without this covenant to save the lessor harmless, the lease of the property would, as this case shows, have been productive of loss, instead of profit, to the lessor or its assigns. So, too, the agreement to indemnify the lessor was one of the conditions, and the most important one, under which the defendants held the property, and was extremely valuable to the assignee of the lessor, and one which, as we have seen, was valueless to the lessor after its assignment of the lease, both in fact and by reason of its surrender. Covenants to indemnify and hold harmless, like that we have been considering, are not entirely new to the courts. They have been held to be legitimate provisions, and have been upheld as not against public policy. *Hartford Fire Ins. Co. v. Chicago, M. & St. P. Ry. Co.*, 17 C. C. A. 62, 70 Fed. Rep. 201, 30 L. R. A. 193. But we have not been able to find an adjudication upon the question whether this particular kind of a covenant runs with the land, and passes to the assigns of the lessor. Our conclusion, however, is, for the reasons stated, that this covenant passed to the plaintiff, and invested it with the same rights of protection against losses by it, and to the same extent and in the same manner as the lessor might have asserted had there been no assignment of the lease. The demurrer was properly overruled. Judgment affirmed. All concur.

(81 N. W. Rep. 52.)

MICHAEL ERICKSON, *et al.* vs. CITIZEN'S NATIONAL BANK.

Opinion filed November 14, 1899.

Jury Trial—Both Parties Move for Verdict by Direction—Waiver.

This is an action to recover money only. A jury was sworn, and after all the evidence had been submitted, and the case was rested on both sides, the defendant requested the trial court to direct a verdict in his favor. This was denied, and defendant excepted to the ruling. The plaintiffs then requested a directed verdict in their favor. The trial court, without ruling on plaintiffs' request, discharged the jury. The court subsequently made findings of fact and law, and judgment was entered in plaintiff's favor, from which the defendant appeals to this court. No exception was taken to the discharge of the jury, and no error is assigned in this court based on such discharge. *Held*, that counsel have waived a jury trial, and consented by their silence to a trial by the court, and hence that the trial and appeal must be governed by chapter 5 of the Laws of 1897.

N. D. R.—6

Retrial—Statement of the Case—Rulings on Evidence—Specifications of Particulars.

The statement of the case embodies specifications of alleged errors of law arising upon rulings of the court below upon the admission of testimony, and also a specification based upon the refusal of the trial court to direct a verdict in defendant's favor. The statement further embrace specifications of particulars wherein the appellant claims that the respective findings of fact are not justified by the evidence. But the statement of the case contains no declaration, as required by said act of 1897, to the effect that the appellant desires a review of the entire case in the Supreme Court; nor does the statement embrace a specification of any fact or facts which appellant desires this court to review. *Held* that, by reason of said omissions in the statement of the case, this court cannot retry either the entire case, or any particular fact in the case, *de novo*. *Held*, further, that in such cases this court does not sit as a court of review, to correct errors arising upon rulings of the District Court upon the admission of evidence. Such rulings will only be passed upon in connection with a retrial in this court. *Nichols & Sheppard Co. v. Stangler*, 7 N. D. 102, 72 N. W. Rep. 1089, followed.

Findings Unsupported by Evidence—Cannot be Set Aside—When.

Held, further, that said specification of particulars in which defendant claims that the findings of fact are without support in the evidence are superfluous, under said statute, and confer no authority upon this court to retry the case, or any fact in the case, anew. Such specifications appertain to jury cases, but not to cases tried to the court. *Bank v. Davis*, 8 N. D. 83, 76 N. W. Rep. 998, followed.

Error Waived by Consenting to Withdrawal of the Jury.

Held, further, that the refusal of the trial court to direct a verdict in defendant's favor, if error, was waived by counsel in consenting to the discharge of the jury and to a trial before the court.

Where Abstract Does Not Show Jurisdiction the Record will be Explored to Determine the Fact of Jurisdiction.

The appellant's abstract stated, in general terms, that defendant appealed from the judgment of the District Court to this court, and contained a copy of such judgment, but omitted to state, as required by rule 13 of the amended rules of this court (6 N. D. xviii), that such appeal was taken by serving and filing a notice of appeal and supersedeas bond. A motion to dismiss the appeal on the ground that the abstract failed to show on its face that an appeal to this court had been perfected was made in this court, and was denied. The abstract was faulty, for the reasons stated; but, in questions affecting the jurisdiction of this court, we shall, when necessary, explore the record proper. In this case no claim is made that the appeal itself was irregular.

Appeal from District Court, Richland County; *Lauder, J.*

Action by Michael Erickson and Jacob Erickson against the Citizens' National Bank. Judgment for plaintiffs, and defendant appeals.

Affirmed.

McCumber & Bogart, for appellant.

Freerks & Freerks, for respondents.

WALLIN, J. This is an action at law for the recovery of money, in which an issue of fact was joined. At the trial a jury was sworn, and the evidence of the plaintiffs was submitted in the presence of the jury, whereupon the plaintiffs rested their case. The defendant, by its counsel, then requested the trial court to direct a verdict in defendant's favor. This motion was denied, and defendant, by its counsel, took exception to such ruling. After the defendant had rested its case, another motion for a directed verdict was made in defendant's behalf, upon certain grounds. This motion was also denied, and the defendant saved an exception to the ruling, whereupon the plaintiffs, by their counsel, requested the court to instruct the jury to return a verdict for the plaintiffs. So far as shown by the abstract filed in this court, there was no ruling made in the District Court upon plaintiffs' motion for a directed verdict. The statement next appearing in the abstract is as follows: "The court then discharged the jury." It also appears that the trial court thereafter filed its findings in the case, embracing thirteen findings of fact and two conclusions of law, and pursuant to which a judgment for \$416 was entered in plaintiffs' favor. Counsel for defendant has attacked each of the findings of fact, except the first, and has caused to be incorporated in the statement of the case specifications, embracing particulars, in which each of said findings of fact is claimed to be unsupported by the evidence. The abstract further contains numerous specifications of alleged errors of law which appertain to rulings made at the trial upon the admission of evidence; and to these are added specifications of error based upon the rulings of the trial court before referred to, and whereby that court denied the defendant's request for a directed verdict. Finally the defendant's counsel adverts to the fact that the trial court dismissed the jury, and specifies such action as error. All or nearly all of said specifications of error are assigned as error in the brief of appellant's counsel filed in this court, but counsel omit to assign error predicated upon the dismissal of the jury. In this court, counsel for the respondents have made a preliminary motion to dismiss the appeal, and bases the same upon the following statement in the appellant's abstract: "On the 20th day of April, 1899, appeal was taken from said judgment by said defendant to the Supreme Court of said State." Counsel criticise this statement on the ground that it omits to state that the appellant served a notice of appeal, and thereafter filed such notice with the clerk. We cannot sustain the motion. It is not based upon an allegation or claim that no notice of appeal was ever served or filed; nor do counsel claim that the record proper does not show all details essential to taking an appeal, or in making the same effectual. Statements in the record should be abridged in the abstract, and we are of the opinion that the statement referred to sets forth the essential fact of an appeal from the judgment. The abstract should show the fact of appeal, and what the appeal is from,—whether from an order or a judgment. This abstract sets out the judg-

ment, and shows that the appeal is taken from such judgment. It is faulty only in omitting to state the details as to giving the notice and the undertaking on appeal, as prescribed by rule 13 of the amended rules of practice (6 N. D. xviii, 74 N. W. Rep. viii). But this court has not declared by any rule that it will dismiss an appeal on the ground that the abstracts are faulty in some matter of detail only. Upon jurisdictional questions, this court, if compelled to do so, will explore the record to ascertain the truth. In this case we shall not have occasion to do so in deciding this motion, for the reason that no claim is made that the appeal was not regularly taken in all respects.

At the threshold of this case we are confronted with a novel question of procedure. What is the status of the case in this court, and, under the established procedure, what are the duties which this court is required to perform with reference to the case? Upon the record, are we to sit merely as a court of review for the correction of errors assigned in the brief of the appellant's counsel, or should we sit as a trial court, and retry the entire case *de novo* upon the facts and merits? As has been seen, the facts presented are anomalous; nor are the questions of practice we have suggested entirely clear, and easy of solution. We will first inquire whether we can try the case anew in this court. If we can, our authority to do so will be found in section 5630 of the Revised Codes, as amended by chapter 5 of the Session Laws of 1897. That section controls all cases tried in the District Court without a jury in which an issue of fact is joined. An issue of fact was joined in this case. In cases tried under said section which are brought to this court, the statute requires that a statement of the case shall be settled, and that the appellant "shall specify therein the questions of fact that he desires the Supreme Court to review;" and, further, that, "if the appellant shall specify in the statement that he desires to review the entire case, all the evidence and proceedings shall be embodied in the statement." In *Bank v. Davis*, 8 N. D. 83, 76 N. W. Rep. 998, this court had occasion to construe these provisions of the amended statute, and there held, in effect, that the statement of the case must contain specifications as stated above, and, when devoid of all such specifications, that this court could not lawfully try a case anew. This rule was applied in a case decided at the present term. See *Ricks v. Bergsvendsen*, 8 N. D. 578, 80 N. W. Rep. 768. In the case of *Bank v. Davis*, supra, we further held, in effect, in cases tried under the amended statute, that only such specifications as are required by chapter 5, Laws 1897, should be embraced in the statement of the case, and in such cases all specifications required by other sections of the statute are superseded by the act of 1897. Turning to the case at bar, we find that the statement of the case embodies no declaration to the effect that the appellant desires "to review the entire case" in this court; nor does the statement contain a specification of any fact or facts which the appellant desires this court to review. The record being

barren of any such declaration or specification, we are, under authority of the cases cited, compelled to hold that we cannot retry the entire case, nor can we retry any particular question of fact in the case. In this holding we do not ignore either the findings of fact or the exceptions thereto as contained in the statement of the case; but, as has been seen, such exceptions are wholly superfluous, and their presence in the record cannot operate to confer jurisdiction upon this court to retry the case upon the evidence. The exceptions to the findings of fact are incorporated in the record for the obvious purpose of specifying the particulars in which the appellant claims the evidence does not support the findings. Such is their language, and they would be entirely appropriate in a case tried by a jury, and afterwards brought here for review of the facts and verdict, with reference to the evidence, for the purpose of correcting errors. We are therefore required by the record to determine whether, under the existing laws of procedure and practice, we can sit as a court of review for the correction of errors. We certainly can do so if the action was tried to a jury, and whether or not this action was so tried must be gathered from the record as a question of fact. After a careful study of the record, we are constrained to hold that the case was not tried by a jury. It is certain that the record contains no verdict, and equally so that it appears that no verdict of any kind was returned by the jury into court. It is also clear that the judgment entered is based upon findings of fact made by the court upon the issues involved, and that such findings purport to be based upon the evidence in the record. It therefore conclusively appears that the issues involved were not determined by a jury, and, despite the complicated questions of practice which the record presents, we are compelled, under the law, to hold that the case was tried to the court. Being tried to the court, the evidence can be reviewed in this court only for the purposes of a trial *de novo*. This point was distinctly ruled in *Nichols & Shepard Co. v. Stangler*, 7 N. D. 102, 72 N. W. Rep. 1089. Upon the authority of that case, the appellant's numerous assignments of error relating to rulings upon the admission of evidence must be disregarded. In the case last cited this court said, with reference to similar rulings, "Under section 5630, such rulings cannot be reviewed, or made the basis of reversing the case for error, as could be done in a jury case." See opinion, page 104, 7 N. D., and page 1089, 72 N. W. Rep.

As we have seen, the assignments of error upon the findings of fact must also be disregarded by this court, for the reason that in this class of cases we do not sit for the correction of errors arising upon the evidence. In such cases we are a trial court. But in the case at bar we cannot discharge our functions as a trial court, on account of the omissions in the record, as already pointed out. Nor can we pass upon the assignment of error based on the request of defendant's counsel for a directed verdict. The questions of fact which the jury was called to try were by consent

of counsel sent to another tribunal for determination, i. e. to the judge sitting as a court. This, in our judgment, must operate as a constructive waiver by the parties of any and all right to a verdict, whether based upon evidence, or returned in obedience to the mandate of the court. After consenting that the court should try the case, neither party should be heard to complain on the ground that he was entitled to the verdict of a jury in the same case. It is true that the record does not affirmatively show that counsel consented to a discharge of the jury, but it does appear that the discharge was made in open court, and hence presumptively in the presence of counsel. No exception to such action appears in the record, and none is claimed to have been taken. The statement specifies the discharge as error, but in this court error is not assigned in the matter in counsel's brief; nor do counsel refer to the point, either in their briefs or oral arguments made in this court. We must therefore assume that counsel have waived a jury trial, and consented to a trial of this case by the court.

It appears in the record that when the case was called for trial the defendant's counsel made a preliminary objection to the introduction of any evidence under the complaint, upon the ground "that the said complaint did not state facts sufficient to constitute a cause of action." This objection was overruled, and defendant's counsel excepted to the ruling. In this court counsel for appellant have omitted to assign this ruling as error. Nevertheless counsel argue in their brief, as well as orally, that the ruling is error. The action is brought, under the general banking law of the United States, to recover the penalty prescribed for usury paid upon loans. The criticism of counsel upon the complaint is that it fails to specifically plead the section, by its number, upon which the action is brought, or otherwise point to the section, either in terms, or by reference to the chapter in which it is found. The complaint does refer to the laws of congress governing national banks, and also to the provisions of such laws relating to the matter of usury; but these references are entirely general, and no mention is made of any particular section or chapter either of the laws of the United States or of this state. Counsel cite section 5787, Rev. Codes, in support of this feature of the case. If the objection to the complaint had arisen upon demurrer, it would have been sustained. See *Greenburg v. Bank*, 5 N. D. 483, 67 N. W. Rep. 597. But, as has been said, this court, in 7 N. D. 102, 72 N. W. Rep. 1089, *supra*, holds that in cases tried to the court, this court does not sit to correct errors. The point under consideration arose upon objection to evidence, and the ruling was made upon the admission of testimony, and cannot, therefore, be considered upon this appeal; no new trial in this court being allowable upon the record. In cases governed by chapter 5, Laws 1897, the statute, at the option of the defeated party, accords to him a new trial of the action in this court. He may, at his option, try the entire case anew in this court; and, to secure this right it is only necessary to appeal to this court, and transmit here a statement of the case,

containing all the evidence and proceedings had and offered in the trial court, together with a declaration to the effect that the appellant desires a retrial of the entire case in this court. This was not done in the case at bar. Our conclusion is that the judgment should be affirmed, and this court will so order. All the judges concurring.
(81 N. W. Rep. 46.)

NILS P. JULIN *vs.* FRITZOF BOWMAN.

Opinion filed November 15, 1899.

Appeal—Review.

This case involves no question of law.

Appeal from District Court, Cass County; *Pollock, J.*
Action by Nils P. Julin against Fritzof Bowman. Judgment for plaintiff, and he appeals.
Modified.

W. A. Barnett and Morrill & Engerud, for appellant.

Pollock & Scott, for respondent.

BARTHOLOMEW, C. J. This action was brought by a *cestui que* trust to compel an accounting on the part of his trustee. The trusteeship extends over a period of about nine years. The plaintiff is an uneducated Scandinavian, being unable to read or write, and testified through an interpreter. The defendant is his fellow countryman, but can read and write. The trust relation grew out of an honest, well-intended purpose on the part of the defendant to aid plaintiff financially, and enable him to pay off his numerous debts, and save his farm from a mortgage foreclosure sale. The trust covers a large number of transactions, involving the receipt and expenditure of several thousands of dollars. Plaintiff kept no books of accounts or record evidence of the various transactions. Defendant kept a book account, but in an irregular and almost unintelligible manner, so that his books furnish but little aid. Under these circumstances, considering the length of time involved, and that the parties must testify almost entirely from memory, it was to be expected that the testimony of the parties would upon all disputed matters be directly conflicting. The corroborating testimony on neither side furnishes a court much aid in reaching the truth; nor will any court ever be able to say, with any approach to certainty, that it has done justice to these litigants. No question of law is involved. Any discussion of the evidence would be a clear waste of time and space. Judgment was rendered against defendant for a small amount. Plaintiff, claiming that the judgment should be larger, brings the case here, but asks us to review the evidence only as to six items for which the trial court allowed the defendant credit. We have examined all the evidence pertaining to those

items. As to four of them, our conclusion agrees with that of the trial court; but, as to the item of \$100 paid as interest to the Fargo Loan Agency on November 28, 1891, and the item of \$73.15 paid to the First National Bank of Fargo as interest on the same date, we are of opinion that the evidence shows that such items were paid from money furnished by plaintiff, and that defendant was not entitled to credit therefor. As a result of this holding, the judgment in favor of plaintiff, which was \$78.02 as found by the trial court, must be so modified as to increase the recovery to the sum of \$251.17. Judgment will be entered in the District Court accordingly, with costs of both courts in favor of plaintiff. It is so ordered. All concur.

(81 N. W. Rep. 51.)

ANNA DAY GRAHAM vs. ANDREW SMITH GRAHAM.

Opinion filed November 16, 1899.

Divorce—Residence—Domicile—Jurisdiction.

Section 2755, Revised Codes, construed, and *held* that the word "resident," as used in said section, is equivalent in meaning to the word "domicile."

Jurisdiction—Mere Temporary Residence in the State for Divorce Purposes Insufficient.

Held, further, that a resident of another state cannot acquire a domicile in this state simply by coming within the state and remaining here physically for the requisite statutory period. To bodily presence within the state there must be added the present bona fide purpose of abiding here indefinitely as a home. Under the evidence in this case, *held*, that plaintiff was not domiciled in this state for a period of ninety days prior to instituting this action, and hence that the courts of this state were without jurisdiction to entertain her action for a divorce from the bonds of matrimony.

Appeal from District Court, Richland County; *Lauder, J.*

Suit by Anna Day Graham against Andrew Smith Graham. Judgment for defendant, and plaintiff appeals.

Affirmed.

Aaron J. Bessie and Lyman B. Everdell, for appellant.

McCumber & Bogart and Jos. G. Forbes, for respondent.

WALLIN, J. This action was brought to obtain a divorce from the bonds of matrimony upon the alleged ground that the defendant willfully neglected to provide for the plaintiff the common necessities of life, although the defendant possessed the ability to do so. The trial court found as a fact "that the plaintiff was not at the time of the commencement of this action an actual and bona fide resident of the State of North Dakota." Upon this finding the trial court (without making further findings of fact) denied the divorce, and

thereafter a judgment was entered dismissing the action, with costs. From such judgment the plaintiff has appealed, and now seeks a retrial of the entire case in this court.

We shall have occasion to consider only the question of residence. At the time the action was instituted the statute declared that "a divorce must not be granted unless the plaintiff has in good faith been a resident of the state ninety days next preceding the commencement of the action." Rev. Codes, § 2755. It has been held by this court and it is now a well-settled rule of statutory construction that "the word 'residence' in statutes giving jurisdiction is interpreted to mean the same as 'domicile.'" *Smith v. Smith*, 7 N. D. 404, 75 N. W. Rep. 783. It follows that the question of fact which was passed upon by the trial court, and which we are to try anew, is whether the plaintiff had, for a period of ninety days prior to the commencement of this action, been a resident of this state, in the sense of having her domicile in this state for that length of time. The term "domicile" has been defined in different language by courts and law writers. A terse definition is as follows: "'Domicile' is the place where the person has fixed his habitation, without any present intention of removing therefrom." See 2 Bish. Mar., Div. & Sep. § 88, note 1. This definition, while it has met with the approval of some courts, is in our judgment too narrow, unless the intention to remove be limited to the time of fixing the residence. The mere fact of an existing intention to remove from the place where one is domiciled cannot, we think, operate against the bona fides of residence. The existence of a mere purpose to go elsewhere to live is not, in our opinion, sufficient to defeat a legal residence in the place where a person is actually domiciled. In such case, until an actual removal occurs, the residence continues to be where the person has acquired a residence in good faith, with the intention of dwelling there indefinitely as a home; but the residence must be originally acquired by taking up one's abode in a place with a good-faith purpose to dwell therein as a home for an indefinite period. Domicile, when based on a claim of removal from a former place of residence, can be made out only by showing that there has been an actual removal, followed by residence in fact in the new place of abode, and coupled with a present intention to dwell in the new place indefinitely as a home. These views of the law of domicile are no longer open to debate in the courts of this country. See *Cook v. Cook*, 56 Wis. 195, 14 N. W. Rep. 33, 443; *Albee v. Albee*, 43 Ill. App. 370; *Dunham v. Dunham* (Ill. Sup.) 44 N. E. Rep. 841; 1 Nels. Div. & Sep. § 40. It is settled in this state, also, that the mere fact that the plaintiff in an action for divorce was led to take up his domicile in this state for the reason that liberal laws exist here upon the subject of divorce does not defeat the bona fides of the residence. See *Smith v. Smith*, supra. But, on the other hand, if one comes into this state for the sole purpose of acquiring a pretended residence,—all the time intending to remove from the

state and live elsewhere as soon as the divorce is granted,—such pretended residence is not sufficient to give the courts of this state jurisdiction to grant a divorce. See *Colburn v. Colburn* (Mich.) 38 N. W. Rep. 607.

In the light of these rules of law, we have examined the record attentively,—which embraces all the evidence offered at the trial,—and have reached the conclusion that the trial court was correct in finding that the plaintiff was not a bona fide resident of this state when she commenced this action; and we are further constrained by the evidence to hold that plaintiff's sojourn in this state has been transient merely, and for the purpose of establishing a fictitious residence for divorce purposes only.

This view of the evidence is, however, strenuously combated by the appellant's counsel, who points to the direct and emphatic testimony of the plaintiff upon this point as follows: "Have been in the state over seven months. This is my residence, and I intend to remain here. I have no other residence or home." Plaintiff further testified that she had resided at Fargo, N. D., two months, and the rest of the time had lived at Wahpeton, N. D. Plaintiff's counsel, in referring to plaintiff's intentions with respect to her residence, say in their brief: "And on that point, (viz: her intentions as to the future) there cannot be, in the nature of things, any evidence but her own direct testimony as to what her intentions are unless it be shown that she at some time had expressed her intention to leave her present domicile, or her lack of intention to remain within the state for an indefinite period or any period after a trial of this action." We cannot yield assent to this proposition of counsel. In any case where intent is necessary to be ascertained, it must be gathered, not alone from the evidence of the party whose intentions are being investigated, but from all concomitant facts bearing upon the question. The most direct and positive statements of intention may be entirely overthrown and disproved by circumstances showing that the statements are untrue. If the rule of evidence contended for by counsel should obtain in the courts, a guilty intent could be disproved in a criminal case by the testimony of the accused to the effect that he had no guilty intent whatever. But in divorce cases it is well established that upon the question of residence the testimony of the plaintiff, while competent, is not conclusive. Nor is the same, when judicially considered, deemed as persuasive evidence as plaintiff's conduct. See 10 Am. & Eng. Enc. L. (2d Ed.) p. 29, and cases cited; *Keith v. Stetter*, 25 Kan. 100; and particularly *Bish. Mar., Div. & Sep.* § 103.

It appears that plaintiff reached Wahpeton, N. D., on the 12th day of November, 1898, and also that the complaint in this action bears date February 9, 1899, or just eighty-nine days after her arrival in the state. True, the action was not commenced by the service of the summons until February 17, 1899. But such promptness manifested by a newcomer in instituting an action for divorce is regarded by the courts as a strong circumstance bearing upon

the question of the bona fides of the residence. See 2 Bish. Mar., Div. & Sep. § 103. With reference to the question of domicile, the plaintiff further testified: "I made up my mind to stay here permanently in December some time. It agreed with me so well. I began to be more quiet. I liked it very well, and made up my mind to stay. Before this I didn't expect to stay, because I didn't know anything about it. This was before I came back the second time. I made up my mind to stay the early part of December." From this evidence it is clear that plaintiff instituted her action prematurely, and in less than 90 days after she had established a domicile in this state. Until some time in December, 1898, plaintiff "didn't expect to stay." But, if she did not expect to remain in this state prior to December, she could not have been domiciled here prior to December. The acquisition of a new domicile implies and necessitates, not only physical presence in the new place of residence, but likewise a present intention to dwell there for an indefinite period as a home. Domicile cannot be initiated by the mere bodily presence of an individual in a given locality, in a case where one leaves his place of domicile with no purpose of establishing a permanent home elsewhere. A mere tour in quest of health or pleasure, or any transient object, undertaken without thought of taking up elsewhere a new and permanent place of abode, cannot operate to destroy one's domicile in his original home.

But we are satisfied from the evidence that plaintiff came to this state only for a divorce, and with a purpose of returning to her Eastern home at once after the divorce was granted. It appears that plaintiff has no children, and is entirely without domestic ties in this state. Her father resides at the East, and, being a man of large means, provides liberally for the plaintiff's support, and did so before she came west, and has done so ever since she has been in North Dakota. No adequate reason is suggested by the evidence why plaintiff should leave her old home, with all its ties and associations, and take up her abode within our borders, other than the fact that the delict upon which she predicates her right to a divorce is not a ground of divorce in the State of New Jersey, from whence she came, and is a ground in this state. Under the issues, the plaintiff has the burden of showing domicile in this state, and this burden cannot be sustained, where the evidence reveals no purpose on plaintiff's part other than that of procuring a divorce in the shortest possible time, to be followed by a prompt return to her former home. It appears that plaintiff's furniture and books are stored in the State of New Jersey, and have never been brought into this state. Her father and brother testify that they did not know that she had come to this state to reside for the purpose of procuring a divorce or for any purpose. When she left the East, viz: Newark, N. J., she gave the lady with whom she boarded to understand that she was going to New York, and when she departed she left her large trunk and her furniture in her room at Newark, and took only a small trunk with her. Plaintiff returned

to Newark for a short time in December, 1898, and when she was about to return to North Dakota she stated to one witness, Miss H., that she could not tell where she was going, but that she would be gone only three or four months. This same witness further stated as follows: "I am sure that Mrs. Graham told me that she was going to North Dakota to get a divorce, and that she was coming back when she got it." But we will not pursue the details of the evidence further. It has been carefully considered by all members of the court, and we are all agreed that the plaintiff failed to show that she was domiciled in this state prior to the commencement of this action. The judgment must be affirmed. All the judges concurring.

(81 N. W. Rep. 44.)

IRA A. HAYES vs. F. W. TAYLOR.

Opinion filed November 17, 1899.

Appeal—Review—Questions of Fact.

Construing chapter 5, Session Laws 1897: In cases tried in the District Court without a jury, including those where the evidence is taken before a referee and reported to the court, this court is without authority to retry either distinct questions of fact, or the entire case *denovo*, where the statement of the case does not contain either specifications of fact, or a request to review the entire case. A request, embraced in the notice of appeal, either to try the case anew, or retry certain specified facts, is wholly inoperative, and confers no authority upon this court to retry the case, or any fact in the case. *Ricks v. Bergsvendsen*, 8 N. D. 578, 80 N.W. Rep. 768.

Appeal from District Court, Ransom County; *Lauder, J.*

Action by Ira A. Hayes against F. W. Taylor, sheriff of Ransom county. Judgment for defendant, and plaintiff appeals.

Affirmed.

H. Doherty, for appellant.

P. H. Rourke, for respondent.

WALLIN, J. The trial of this action, which is an action to recover money only, resulted in a judgment of dismissal, with costs to the defendant. Plaintiff has appealed to this court from such judgment. In his notice of appeal he has set forth, among other things, that he desires a review of the entire case in this court *de novo*. We find in the record a statement of the case, embracing all the testimony and all the proceedings had at the trial; but such statement embodies no specification of any fact or facts which plaintiff desires to review in this court, nor does the statement contain a declaration to the effect that the plaintiff desires a retrial of the entire case in the Supreme Court. Nothing of the kind is suggested in the statement of the case. The case was tried before the District Court without a jury; all the testimony being taken before a referee,

who reported the same to the District Court without making findings either of law or fact. Subsequently the trial court made and filed findings of fact and law, upon which the judgment was entered. In this court, appellant's counsel has assigned a lengthy list of alleged errors. They relate to rulings at the trial made upon the admission of evidence, and to the refusal of the referee to make rulings upon the admission of evidence, and to various other rulings at the trial, including that of allowing an amended answer to be filed. We make reference to these assignments of error only in general terms, because the case, upon the record, does not admit of a review or retrial of the same, or any of them, by this court. The case must be governed by the provisions of chapter 5 of the Session Laws of 1897. Under that statute this court does not sit merely as a court of review to correct errors. By its provisions we are authorized to try specific questions of fact anew, or to try the whole case anew; but this can only be done where the record embraces a statement of the case, in which the appellant specifies some fact or facts which he desires to have retried, or states therein that he desires a review of the entire case in this court *de novo*. The statement of the case in this record, as has been seen, is devoid of any specification or declaration such as the statute requires as a prerequisite to any trial in this court. We are, therefore, upon this record, precluded from a retrial of any of the facts in issue; and being without authority to retry any fact in the case, or to review the whole case, we cannot sit to review errors of law occurring during the trial in the court below. See *Nichols & Shepard Co. v. Strangler*, 7 N. D. 102, 72 N. W. Rep. 1089. We have, in cases already decided, covered all the grounds upon which we base our conclusions in this case. In a case handed down at the present term, we hold that a demand for a retrial in this court either of the entire case, or of specified facts therein is, when inserted in a notice of appeal, wholly inoperative as a demand. See *Ricks v. Bergsvendsen*, 8 N. D. 578, 80 N. W. Rep. 768. See, also, *Erickson v. Bank*, 9 N. D. 56, 81 N. W. Rep. 46; also, *Bank v. Davis*, 8 N. D. 83, 76 N. W. Rep. 998; and *Mooney v. Donovan*, 9 N. D. 93.

Our conclusion is that the condition of this record is such that no part of the case, whether involving questions of law or fact, can be reviewed in this court. It follows that the judgment of the trial court will be affirmed. All the judges concurring.

(81 N. W. Rep. 49.)

W. J. MOONEY vs. E. I. DONOVAN.

Opinion filed November 17, 1899.

Review in Mandamus.

Whether mandamus proceedings come within the provisions of chapter 5, Laws 1897, relating to the trial of civil actions by the court, not decided.

Statement of Case—Specification of Particulars.

But when a statement of the case fails to contain the specifications as required by section 5467, Rev. Codes, it must be disregarded by this court if the proceeding was tried under the old system; and when it fails to contain specifications required by chapter 5, Laws 1897, it must be disregarded if tried under that law.

Order Denying Motion to Quash Mandamus Not Part of Judgment Roll.

Under section 5489, Comp. Laws, before an order of the court can become a part of the judgment roll without being made so by a statement of the case, it must be an order "involving the merits and necessarily affecting the judgment." *Held*, that an order denying a motion to quash an alternative writ of mandamus forms no part of the judgment roll, unless made so by a statement of the case.

Appeal from District Court, Cavalier County; *Sauter, J.*
Action by W. J. Mooney against E. I. Donovan. Judgment for plaintiff, and defendant appeals.
Affirmed.

J. C. Monnet, for appellant.

Joseph Cleary, for respondent.

BARTHOLOMEW, C. J. This was a proceeding by mandamus on the part of a stockholder to compel the secretary to permit him to inspect the books and records of the corporation. He was successful in his efforts, and the secretary appeals. We regret that the interesting questions raised by the appeal cannot be investigated in this court, but the practice statutes will not permit it. The alternative writ issued, and on the return day the defendant moved to quash for insufficiency of statement. The motion was denied, and an exception saved. Subsequently an answer was filed raising issues of fact, and the case was tried before the court upon parol testimony. Findings of fact and conclusions of law were made, followed by a judgment awarding the peremptory writ, and the issuance of the writ.

It is clear from a perusal of the abstract that, at the trial of the case, court and counsel proceeded upon the theory that the matter was being tried under the provisions of law relating to the trial of civil actions to the court without a jury; and the defendant, in preparing his appeal, evidently proceeded upon the same theory. It will be unnecessary in this case for us to decide whether or not those statutes apply to the special proceeding of mandamus, because, as we view it, the merits of this controversy cannot be investigated, either under those statutes, or under the practice as it existed prior to the enactment of those statutes. In the statement of the case filed in this court, appellant does not state that he desires any particular issues of fact retried, or that he wants the entire case retried. In this state of the record we have repeatedly held that under the provisions of chapter 5, Laws 1897, we were powerless to re-examine the facts in a case tried to the court without a jury. *Bank v. Davis*, 8 N. D. 83, 76 N. W. Rep. 998; *Ricks v. Bergsvend-*

sen, 8 N. D. 578, 80 N. W. Rep. 768; and *Erickson v. Bank*, (decided at this term) 81 N. W. Rep. 46. Some effort is made by counsel to save this point on the ground that the statement was settled by the court pursuant to a stipulation. But plaintiff never stipulated that defendant's proposed statement was in due form, or sufficient to enable him to raise the facts in this court. Nor can the omission from the statement of the case of language which the statute in terms requires should be included therein be aided by anything in the certificate of the judge settling the statement.

But, if we hold that this mandamus proceeding does not come within the terms of the statute regulating trials and appeals in cases tried by the court without a jury, it is equally certain that under the long-established practice under section 5467, Rev. Codes, we cannot examine the testimony. The statement of the case presented to us contains no exceptions to the findings of fact, and no specifications of particulars wherein such findings are not supported by the evidence, or of the errors of law upon which the appellant intends to rely. The section last cited declares: "There shall be incorporated in every such statement a specification of the particulars in which the evidence is alleged to be insufficient to justify the verdict or other decision and of the errors of law upon which the party settling the same intends to rely. If no such specification is made the statement shall be disregarded on motion for a new trial and on appeal." It is clear that the statement must be disregarded, and the facts cannot be investigated. But can we review the ruling upon the motion to quash? Section 5627, Id., reads: "Upon an appeal from a judgment the Supreme Court may review any intermediate order or determination of the court below, which involves the merits and necessarily affects the judgment, appearing upon the record transmitted or returned from the District Court, whether the same is excepted to or not; nor shall it be necessary in any case to take any exceptions or settle a statement of the case to enable the Supreme Court to review any alleged error which would without a statement appear upon the face of the record." This language was borrowed from Wisconsin. It now appears in section 3070, Rev. St. Wis. 1898, but was the law in Wisconsin long prior to its adoption by Dakota Territory in section 24, chapter 20, Laws 1887. Of course, the matter to be reviewed must in some manner appear upon the record. In this instance it appears by a settled case, but there is no proper specification in such statement; consequently it cannot be reviewed, unless it would appear upon the record without such statement. In other words, is it a part of the judgment roll without being made so by a statement of the case? Section 5489, Rev. Codes, declares what constitutes the judgment roll (1) in default cases; and (2) "in all other cases, the summons, pleadings or copies thereof, the verdict, decision or report, the offer of the defendant, a copy of the judgment, the statement of the case, if any, and all orders and papers in any way involving the merits and necessarily affecting the judg-

ment." This, too, comes from Wisconsin, and is practically identical with section 2898, Rev. St. Wis. 1898. It will be noticed that certain matters other than the pleadings and decision and judgment may appear in the judgment roll without a statement of the case, to-wit: "all orders and papers in any manner involving the merits and necessarily affecting the judgment." Do the motion and order here involved come under that provision? As early as *Williams v. Holmes*, 7 Wis. 168, it was held that "motions made in the progress of a cause are not part of the record, and can only be made so by bill of exceptions properly settled;" and to same effect are *Demming v. Weston*, 15 Wis. 236; *Tubbs v. Doll*, Id. 640; *Cornell v. Davis*, 16 Wis. 686. In *Bradley v. Cramer*, 67 Wis. 415, 30 N. W. Rep. 622, it was held that an order denying a motion to dismiss did not go to the merits. In *State v. Supervisors of Lincoln*, 67 Wis. 274, 30 N. W. Rep. 360, which was a mandamus proceeding, it was held that an order setting aside the service of the alternative writ did necessarily affect the judgment, as it terminated the case—which was initiated by the service of such writ,—and compelled the plaintiff to commence another action. In *Donkle v. Milem*, 88 Wis. 33, 59 N. W. Rep. 586, it was held that an order opening a judgment by default, and permitting defendant to answer, could not be reviewed upon an appeal from the judgment, unless brought upon the record by a bill of exceptions. In *Keller v. Town of Gilmann* (Wis.) 71 N. W. Rep. 809, it was held that an order granting a new trial could not be reviewed on appeal from the judgment on the second trial, unless brought upon the record by a bill of exceptions. These citations are sufficient to show the practical construction that has been placed upon these statutes. Before the order becomes a part of the judgment roll, under these provisions, it must not only involve the merits, but it must necessarily affect the judgment, either by terminating the action so that no judgment can be rendered, or by making it certain that by reason of the order the judgment will necessarily be different from what it would be were the order not made. In this case the denial of the motion left the case for trial on the merits, with no assurance that the judgment might not be in all respects the same as it would have been had the motion been granted. It follows, then, that the order is not before us, unless brought there by the statement; and, as we have said, the statement is ineffectual for that purpose, because it contains no specification of errors, as required by section 5467, Rev. Codes, or chapter 5, Laws 1897. The judgment appealed from is affirmed. All concur.

(81 N. W. Rep. 50.)

JOHN J. CHILSON vs. THE BANK OF FAIRMOUNT.

Opinion filed November 17, 1899.

General Objection to Evidence for Insufficiency of Complaint.

An objection to the introduction of any evidence in a case, upon

the ground that the complaint does not state sufficient facts to constitute a cause of action, is insufficient in not directing the attention of the trial court to the defect in the complaint upon which the party making the objection relies, and the overruling of an objection couched in that form is not, therefore, available error upon appeal.

Consideration for Contract.

The mere doing of an act which one is under legal obligation to perform does not furnish a consideration which will support a new contract.

Appeal from District Court, Richland County; *Sauter, J.*
Action by John J. Chilson against the Bank of Fairmount. Judgment for plaintiff, and defendant appeals.
Affirmed.

W. E. Purcell, for appellant.

Freerks & Freerks, for respondent.

YOUNG, J. This action was originally instituted in a Justice's Court of Richland county, in which court the plaintiff secured a judgment. Defendant took an appeal to the District Court, where, upon a retrial upon the same issues and under the same pleadings, the plaintiff was again successful, and secured a verdict for the amount demanded in his complaint, and judgment was ordered and entered therein. A motion for a new trial was made and overruled. The motion was based upon a settled statement of the case, in which is embodied a specification of some thirty-six alleged errors of law occurring at the trial as the grounds of said motion. This appeal is from the order refusing to grant a new trial and from the judgment. In this court counsel for appellant urges but a portion of the alleged errors as grounds for asking that the judgment of the District Court be reversed. These only will be considered.

It is necessary, first, to ascertain what the issues were which were submitted for the determination of the jury, in order to properly consider the errors which are urged as having occurred at the trial of the case. The complaint, in substance, alleges that in the year 1893 the plaintiff was the owner of a certain quarter section of land in Richland county; that he executed a mortgage thereon to one A. C. Waterman, to secure an indebtedness to the latter of \$600; that thereafter, to further secure such indebtedness, he executed and delivered to the said Waterman a quitclaim deed to said premises, upon the agreement and understanding that, upon the payment of the debt secured, the land was to be reconveyed to plaintiff; that the defendant had knowledge and notice of such agreement; that on May 14, 1898, thereafter, the said Waterman executed and delivered a quitclaim deed of said land to one Cox, the defendant's cashier; that at the time of the conveyance from said Waterman to defendant there was an agreement entered into

between plaintiff and defendant that said defendant would reconvey to plaintiff upon payment to it of the sum due upon the Waterman mortgage, in pursuance of the original contract between plaintiff and Waterman, and, further, that, pending such redemption, the plaintiff was to pay a reasonable rent for the land, and that such sums as should be paid as and for rent were to be refunded in case the mortgage debt should be paid; that in October, 1898, the defendant received as rent the sum of \$105; that defendant then again agreed in writing to refund the sum so paid upon payment of the mortgage debt; that on December 5, 1898, the plaintiff paid to the defendant the sum of \$728, the amount due upon the mortgage debt, and demanded payment of the \$105 received by defendant as aforesaid, and was refused. The answer denies that the plaintiff has been the owner of the land in question at any time since November 10, 1893, and alleges that on that date the plaintiff conveyed his entire interest therein to A. C. Waterman; that the said Waterman, as absolute owner thereof, conveyed the same to the defendant on May 14, 1898, by quitclaim deed; and denies both knowledge or notice of the agreement alleged in the complaint, and avers that the defendant was thereafter the absolute owner in fee simple of said premises. Defendant admits the payment of \$80 upon rent, but denies the payment of any greater sum, and denies that it ever agreed to refund such payments. Further answering, the defendant alleged that on December 1, 1898, it was agreed between the plaintiff and defendant that, if plaintiff would furnish a purchaser for said land who would pay defendant the amount of the mortgage debt, the plaintiff might have all of the money realized above that required to pay the debt; that the plaintiff did furnish a purchaser, one Houston, to whom defendant delivered a conveyance of said land, and from whom it received the amount of mortgage debt, to-wit: \$728; that the deed so executed and delivered to Houston was based upon the consideration of the sum so paid, and plaintiff's agreement that defendant might retain in addition thereto the \$105 theretofore received as rent. Briefly, plaintiff's position is that it paid to the defendant \$105, which sum the defendant agreed to repay upon payment of the mortgage debt, and that said debt was paid. Defendant's position is that plaintiff agreed that it might keep the \$105 as part consideration for the deed to Houston. Upon these issues so framed by the pleadings the case was tried to a jury, with the result before stated.

Counsel's first assignment is that the court erred in not sustaining an objection which was made at the opening of the trial, and after the first witness was worn. The objection was as follows: "The defendant objects to the introduction of any evidence in this case, for the reason that the complaint fails to state facts sufficient to constitute a cause of action." This objection to the evidence, which was about to be offered in support of the complaint, was wholly insufficient, in that it in no manner directed the attention of the trial court or opposing counsel to the particular ground of the

objection, or to any particular defect in the complaint, and the overruling of such objection is not, therefore, available as error; for it is essential to a review of alleged errors in the admission of evidence that the particular grounds of the objection shall have been disclosed to the trial court and ruled upon. In this connection, Thompson on Trials (section 693) states the rule, and the reason therefor, correctly, as follows: "Where evidence is objected to at the trial, if the party would save an exception to the ruling of the court if adverse to him, such as will be available on appeal or error, he must frame his objection so as to bring to the attention of the trial court the specific ground upon which he predicates it, and this must be stated in his bill of exceptions. He waives all grounds not so specified. The reason of the rule is twofold: (1) To enable the trial judge to understand the precise question upon which he has to rule, and to relieve him from the burden of searching for objections which counsel is unable to discover, or which he sees fit to conceal; (2) to afford the opposite party an opportunity to obviate it before the close of the trial, if well taken,"—and citations. See, also, *Bowman v. Eppinger*, 1 N. D. 21, 44 N. W. Rep. 1000. We may add, however, that the complaint does state a cause of action, and counsel does not seriously contend that it does not.

At the close of plaintiff's testimony, defendant asked for a directed verdict, on the ground that the evidence was insufficient to establish a cause of action, which motion pointed out the particulars wherein the evidence was claimed to be insufficient. This was overruled, and is assigned as error. The same motion was made at the close of all of the evidence, and the same ruling made. These rulings were not erroneous. There is substantial evidence upon every point necessary to a recovery by plaintiff.

Counsel for defendant requested the following instruction: "In any event, whether the deeds from Chilson to Waterman, and from Waterman to Cox, were mortgages or not, so long as they were of record as deeds, and not mortgages, and it would require an action in court to declare such deeds mortgages and to permit Chilson to redeem, the making of the deed by Cox to Houston, at Chilson's request, was a sufficient consideration for the retention of the money involved in this action by the defendant bank." The refusal to give this instruction was not error. Counsel for defendant correctly states in his brief that "the only question, under the pleadings and under the evidence, is whether the defendant had promised to repay to the plaintiff a certain sum of money." It must be apparent that, if plaintiff performed the conditions entitling him to a repayment of the \$105 and to a conveyance, namely, the payment of the mortgage debt, the execution and delivery of the deed by the bank was merely the performance of its obligation and legal duty to do so, and that the doing of that which it had legally bound itself to do could not furnish a consideration for the exaction of a greater sum of money than theretofore agreed upon. On this, Bishop, in his work on Contracts (section 48), says: "One, by undertaking to do or

by doing what the law or a previous agreement requires of him, merits nothing, and it is not a consideration for anything." *Roberts v. Bank*, 8 N. D. 474, 79 N. W. Rep. 993.

Counsel also complains of a long examination of the cashier, Cox, conducted by the trial judge, which had for its purpose the elicitation of the fact that the defendant bank had knowledge and notice of the agreements which existed between Waterman and Chilson when it obtained the quitclaim deed. We find no error in the examination conducted by the court, requiring a review in detail. The evidence elicited was competent, and was relevant to the issues made by the pleadings. A presiding judge may interrogate witnesses for the purpose of developing the true facts in a case, regardless of the effect it may have upon the interests of either party. The questions so propounded should, however, be such as are suggested by the evidence given on the trial. *Thomp. Trials*, § 355. The examination here in question was, we think, within the above rule.

The charge of the court embodied, at considerable length, an exposition of certain legal principles applicable to a determination of whether a deed in form is so in fact or is in effect a mortgage, with particular reference to the deed given by plaintiff to Waterman. The law relating to notice was also given at length. The giving of these instructions is assigned as error. Counsel does not challenge the correctness of the abstract legal principles announced in the instructions complained of, but urges that they were misleading and prejudicial, in diverting the attention of the jury to questions which were not in issue. This objection is not tenable upon the record, for it appears that a square issue existed, both in the pleadings and in the evidence, as to the nature of the transaction between the plaintiff and Waterman, and as to the extent of defendant's knowledge thereof, and these precedent facts were material to aid the jury in determining whether the agreement to repay the \$105 was or was not made. The remaining assignments are disposed of by those already considered. Finding no error in the record, the judgment of the District Court is affirmed. All concur. (81 N. W. Rep. 33.)

SAMUEL D. RICHARDSON *vs.* F. H. CAMPBELL.

Opinion filed November 20, 1899.

Appeal from Justice—Notice—Service of Bond—Appeal by Administrator.

Sections 6771, 6772, 6776, Rev. Codes, relating to appeals from Justice's Courts, construed. *Held*, that the service of a notice of appeal upon the adverse party, and the filing of the same with an undertaking with the clerk of the District Court within thirty days from the rendition of the judgment appealed from, do not alone give the District Court jurisdiction of such appeal. Service of the statutory undertaking is also necessary. *Held*, further, that the District Court, in case of failure to serve such undertaking, is without jurisdiction to grant leave to the appellant to serve and file a new undertaking.

Administrator Must Give Cost Bond on Appeal.

Section 6258, Rev. Codes, providing that executors, administrators, and guardians may appeal from certain decrees and orders without giving an appeal bond, construed; and *held*, that said section applies only to appeals from County to District Courts, and does not exempt them from giving the cost bond required by section 6772, Id., upon all appeals from judgments rendered in Justice Courts.

Appeal from District Court, Cass County; *Pollock, J.*

Action by Samuel D. Richardson against F. H. Campbell. Judgment for plaintiff. Defendant appeals.

Affirmed.

Smith Stimmel, for appellant.

A. G. Hanson, for respondent.

YOUNG, J. The plaintiff secured judgment in Justice Court in Cass county upon a claim against the estate of W. L. Richardson, deceased, which had been rejected by the administrator. The administrator attempted to appeal to the District Court from that judgment, and with that end in view, within the time allowed by the statute, served a notice of appeal upon plaintiff's counsel, and filed the notice so served with the clerk of the District Court of Cass county. No undertaking of any kind was served, however, either with the notice of appeal or at all. An undertaking in form was filed in the clerk's office. The plaintiff moved the dismissal of defendant's appeal in the District Court upon the grounds—First, that no undertaking had been served upon the plaintiff or his counsel; second, that no such undertaking as is required by law had been filed with the clerk of the District Court. The defendant, at the hearing of the motion to dismiss, asked leave to amend and perfect his appeal by serving and filing a new undertaking. This was denied, and plaintiff's motion to dismiss was granted upon both of the grounds upon which it was made, and a judgment was ordered and entered dismissing the appeal. The defendant appeals from the judgment of dismissal, and presents for review the rulings of the court which we have just mentioned.

The appeal attempted to be taken from the judgment of the Justice Court is governed by chapter 6 of the Justices' Code, relating to appeals from Justices' Courts. Chapters 6 and 7 of the Laws of 1897 do not affect any of the particular provisions of the Revised Codes which we shall have occasion to discuss as governing this appeal. Is the service of an undertaking necessary to give the District Court Jurisdiction, or is jurisdiction given merely by the service and filing of the notice of appeal and filing of the undertaking? We are of opinion that service of the undertaking is a jurisdictional prerequisite. Section 6776, Rev. Codes, as amended by chapter 6, Laws 1897, in force when this appeal was taken, provides that "the undertaking must be served with the notice. The remaining portion of the section relates to the method of excepting to the sureties on the undertaking, and the manner in which they may justify, and

the effect of their failure to do so. This statute explicitly requires that the undertaking must be served with the notice of appeal, and in language which is not capable of being misunderstood. Our conclusion that service of the undertaking is an essential step in taking the appeal, and a prerequisite to give the District Court jurisdiction, is reinforced by the obvious purpose of such service, namely, to afford to the adverse party an opportunity to require the sureties to justify, if it shall be deemed necessary; all of which provisions are embodied in the very section which requires the undertaking to be served with the notice. The defendant, then, in the case at bar, not having served an undertaking as required by the statute referred to, the District Court was entirely without jurisdiction of the appeal; and from this it follows that the order denying appellant's request for leave to serve and file another undertaking out of the statutory time was proper, for such leave could have been granted only by an assumption of jurisdiction which did not exist, and would have been, in effect, to create jurisdiction in itself, which, of course, is impossible. *McDonald v. Paris* (S.D.) 68 N. W. Rep. 737; *Smith v. Coffin* (S. D.) 70 N. W. Rep. 636.

Appellant's chief contention is that, as administrator, he was not required to give and serve an undertaking to avail himself and the estate of the right of appeal. In support of this, counsel cites the following from section 6258, Rev. Codes: "An executor, administrator or guardian may appeal without filing an undertaking from a decree or order made in any proceeding in a case in which he has given an official bond; and when he appeals in that manner the bond stands in place of such undertaking." The language just quoted is clearly not applicable to appeals from Justice and District Courts. Section 6258, *supra*, is one of the 26 sections which are found in article 9, chapter 3, Prob. Code, and relate solely to appeals from the county court, as is clearly shown by the first section (section 6254), which reads: "Any party or other person specified in the next section who deems himself aggrieved may appeal, as prescribed in this article, from a decree or from an order affecting a substantial right made by a County Court to the District Court of the same county." Each and every section of article 9, including the section relied upon, relates to appeals from the county to the District Court, and the widest possible interpretation would not permit us to say that the section relied upon had any reference or bearing upon appeals from the judgment of other courts.

Appeals from Justice Courts are regulated by chapter 6 of Justice's Code, as amended. Any party dissatisfied with a judgment may appeal to the District Court by complying with the statutory requirements for such appeal. One of these is found in section 6772, and is this: "To render an appeal effectual for any purpose, an undertaking must be executed on the part of the appellant by a sufficient surety to the effect that the appellant will pay all costs which may be awarded against him on the appeal, not exceeding one hundred dollars, which undertaking shall be

approved by and filed in the office of the clerk of the District Court of the county to which appeal is taken." If a stay of execution is desired, it may be secured by executing, serving, and filing the bond provided for in the next section (6773), namely, one not less than twice the amount of the judgment appealed from, and conditioned for the payment of both judgment and costs. It is true, as counsel urges, that the giving of the stay bond would have been an unnecessary and an idle ceremony in this case, so far as it is related solely to a stay of execution; for the judgment was not such a one as could, in any event, be enforced by an execution. Article 5, chapter 6, Prob. Code, as amended by Laws 1897, chapter 111, subd. 16, provides that "a judgment rendered against an executor or administrator in the District Court, or before a magistrate, upon any claim for money against the estate of his testator or intestate, only establishes the claim in the same manner as if it had been allowed by the executor or administrator, and the judge of the County Court, and the judgment must be that the executor or administrator pay, in due course of administration, the amount ascertained to be due. A certified transcript of the judgment must be filed in the County Court. No execution must issue upon such judgment, nor shall it create any lien upon the property of the estate, or give to the judgment creditor any priority of payment." It is thus seen that the effect of the judgment is merely the legal ascertainment of the amount due, with a further provision that it shall be paid in due course of administration. The feature of costs, however, is not disposed of in the same way. Subdivision 21 of the same chapter and article provides that "when a judgment is recovered, with costs, against any executor or administrator, he shall be individually liable for such costs, but they must be allowed him in his administration accounts, unless it appears that the suit or proceeding in which the costs were taxed was prosecuted or defended without just cause." The effect of this last provision is to make the prosecution of appeals by executors and administrators their individual acts, in which they incur an individual liability for the costs which may be taxed in the judgment against them. They may be repaid, and will be, unless the suit was prosecuted or defended without just cause; but if they are repaid it will not be pro rata, as a mere claim against the estate and in due course of administration, but will be paid in their administration accounts, as any other legitimate expenditure. There is the same reason, then, why an administrator or executor, who chooses to further contest a claim against the estate of a decedent which has been allowed by a court, should, upon appeal, be required, for the protection of the adverse party, to provide the same cost bond as is required from other suitors upon appeals. Further, it is not an injustice to the administrator. In taking an appeal he is apprised in advance that he does so at the peril of having, not only to pay the costs adjudged against him if he fails, but also that he will not be reimbursed if it shall appear that he proceeded without

just cause. The provision is a wise one, and is well calculated to prevent the dissipation of estates in useless litigation, by placing the liability for costs primarily upon the executor or administrator. Our conclusion is that the appellant was required to serve, as well as file, the cost bond required by section 6772, Rev. Codes, and that, not having done so, the District Court obtained no jurisdiction, and the appeal was properly dismissed.

Judgment affirmed. All concur.

(81 N. W. Rep. 31.)

GOTTLIEB DOBLER *et al* vs. GOTTLIEB STROBEL.

Opinion filed November 21, 1899.

Administrator—Accounting.

A party who has been appointed as administrator of an estate, and received letters of administration therein, and has seized and misappropriated and dissipated the property of the estate, cannot evade an accounting upon the ground of the nullity of his appointment.

Appeal from District Court, McIntosh County; *Lauder, J.*

Action by Gottlieb Dobler and David Dobler, by A. W. Clyde, special guardian, against Gottlieb Strobel. Judgment for plaintiffs. Defendant appeals.

Affirmed.

L. T. Boucher, for appellant.

A. W. Clyde, for respondents.

BARTHOLOMEW, C. J. The facts upon which the questions of law here involved rest are as follows: On November 24, 1897, Matthias Dobler died intestate in McIntosh county, in this state. That he left surviving him, and as his only heirs at law, two sons,—Gottlieb Dobler, aged 14 years, and David Dobler, aged 10 years,—the respondents herein. That on December 18, 1897, the petition of Jakob Dobler was presented to the county judge of said county, which petition set forth the death of said Matthais Dobler, and named the respondents as his children, and stated that petitioner was a brother of deceased, and that deceased left certain specified personal property and certain real estate, and asking the appointment of Gottlieb Strobel as administrator of said estate. Upon the same day the bond of Gottlieb Strobel as such administrator was filed and approved, and letters of administration were issued to him by the said county judge, and his oath of office filed, and appraisers were appointed and filed their oaths of office. Three days later, to-wit: on December 21, 1897, an inventory and appraisal of the personal property was filed, and on the following day the administrator filed an application for leave to sell the personal property. The record is then silent until November 9, 1898, when A. W. Clyde filed in said County Court an application to be ap-

pointed special guardian for Gottlieb and David Dobler, alleging that he was a friend of said minors, and that they had no general or special guardian, and that he desired to commence a special proceeding before said court against said administrator, as such special guardian, upon a petition, a copy of which was annexed to, and formed a part of, the application. The sufficiency of such petition is not questioned. After setting forth the appointment of said administrator in manner and time as before stated, and without any citations to or appearance upon the part of said minors, the petition continues: "That nevertheless said Gottlieb Strobel assumed the duties of administrator of said estate, and took possession of the property, and assumed to act as such administrator in the management and settlement of the estate, and in so doing has wrongfully misappropriated the personal property belonging to the deceased at the time of his death, the same being property exempt by law from the payment of his debts, which misappropriation he has made by omitting and neglecting to have the exempt personal property aforesaid appraised and set apart as such to the use and benefit of your petitioners, and by wrongfully selling and disposing of the same without authority of law or the order of the County Court, and by wrongfully misapplying the same, or the proceeds thereof, to divers persons claiming or pretending to be creditors of said deceased." And the prayer of the petition is as follows: "Petitioners pray that said Gottlieb Strobel may be required to render a full account of all his doings as such administrator, and that his account may be fully settled by the court, and that thereupon his letters of administration may be revoked; that a successor may be appointed to complete the administration of the estate; and that he be ordered and directed to pay over to his successor all money and property for which he is justly accountable, as determined by the court, to the end that the rights of your petitioners may be duly observed; and for such other and further relief as may be just and proper." The application was granted when presented, and the special guardian was authorized to verify and file the petition; and upon the same day a citation was issued, to the administrator, returnable December 5, 1898, requiring him to appear and answer the petition. On the return day both parties appeared, and the administrator asked for further time, to enable him to employ an attorney and make answer. The time was allowed, and the hearing adjourned to December 10, 1898. Upon that day the administrator failed to appear, whereupon the petitioners by their special guardian, asked that he be adjudged in default for want of an appearance and answer, and that the court proceed with the hearing upon the petition. The court denied this request, and upon its own motion entered an order setting aside and canceling, and declaring null and void, all proceedings theretofore had in the matter of said estate, including the appointment of the administrator and the appointment of the special guardian. The court based its action upon the ground that its record and the petition of the minor

heirs showed that the court never acquired jurisdiction to act in the matter. The petitioners appealed from such order to the District Court, and in that court the order of the County Court was reversed and set aside in toto. From the order of the District Court the administrator appeals to this court.

The questions for decision upon these facts are simple: Was the action of the County Court in appointing the administrator regular or irregular, or absolutely void? And, in taking possession of the estate, did the appellant act as an administrator *de jure*, or as administrator *de facto*, or as a bald trespasser? The learned District Court appears to have entertained but little sympathy for the position of the administrator in this case. We adopt the following language found in the opinion of that court: "The respondent was appointed administrator of this estate. He was duly commissioned by the court to take into his possession, all and singular, the property thereunto belonging. This he did, and did it under the mandate of the County Court. On the face of the record, it appears that most of the property was exempt to the two minor heirs. The petition of the special guardian, asking for an accounting, alleges under oath that the property of the estate has been willfully and unlawfully diverted from the purpose to which the law assigns it; that it has been disposed of without authority of law, and, unless protected by the court, the minor heirs will be defrauded of their just rights. If the position taken by the County Court is correct, there has been no administrator, no bond, and no case in the County Court; and even though all the property belonging ultimately to the minor heirs has been seized and disposed of, and this under the order of the County Court, these same heirs are without remedy, except eventually in a personal action against the respondent, who, for aught that appears, is insolvent. To assume that such is the law is, in my opinion, a reproach upon the administration of justice. Helpless children cannot be juggled out of their rights by any such legal legerdemain. The County Court seems to have confounded jurisdiction of the case; that is, of the property of the estate, the res, and jurisdiction of the persons interested. Section 6183, Rev. Codes, provides that the County Court obtains jurisdiction of the case by the existence of certain facts, and the filing the petition setting forth such facts, and then provides how jurisdiction of the interested persons may be obtained. The distinction between jurisdiction of the subject-matter and jurisdiction of the person is as clearly drawn in Probate Court as in any other. The original petition, while confessedly not artistically drawn, was clearly sufficient to give the county judge jurisdiction of the case. This being so, the proceedings in reference to appointment of an administrator, the property of the estate, etc., were not null and void. Doubtless, upon application of the heirs, the respondent would have been restrained from acting further, and removed, because of the irregularity of his appointment; but, until such proceedings were had, respondent would continue to be in

fact and in law administrator, and obliged to account when called upon." It will be conceded that the appointment of appellant was extremely irregular, and must have been set aside upon application of any party entitled to attack it. Here it is the administrator himself who is seeking to sustain the order declaring the appointment void on the ground of want of jurisdiction in the court making the appointment. In the case of *Culver v. Hardenbergh*, 37 Minn. 225, 33 N. W. Rep. 792, where the acts of an administrator were being attacked by interested parties on the ground that his appointment was void, the court said that the authorities were not agreed as to whether there might or might not be an administrator *de facto*. But the court also said that it could see no reason why there might not be an administrator *de facto* as well as a probate judge *de facto*. The point was not decided, but the court clearly inclined to the affirmative of the proposition. In *Succession of Dougart*, 30 La. Ann. 268, the court said: "As to the illegality of the appointment of the executrix, it is only necessary to say that the question cannot be raised in this indirect and collateral way. Whether legally or illegally done, she was appointed and qualified, and must be treated as the lawful executrix until her appointment is revoked in a direct action." In *Cloutier v. Lemee*, 36 La. Ann. 305, the court said: "Inquiries touching the legality of defendant's appointment are irrelevant. While actually exercising the office, he must perform its duties, and the illegality of his appointment will not vitiate his acts." In *Succession of Robertson*, 49 La. Ann. 80, 21 South. Rep. 197, the court cited the foregoing and many other authorities, and said: "Adhering to this line of authority, we are of opinion that the acts of the qualified and acting executrix must be recognized as valid, and that the subsequent nullity of her appointment would not vitiate them." All these were cases where parties interested in the estate were attacking appointments made by the Probate Court. In *Appeal of Ela* (N. H.) 38 Atl. Rep. 501, which was a case where an administrator sought to avoid an accounting upon the ground that his appointment was a nullity, the court said: "Another consideration fatally adverse to the plaintiff is that a party cannot set up the invalidity of a decree under which he has obtained and holds property as a defense to an accounting for that property. It is useless to argue such a self-evident proposition. What is clearly apparent needs not be proved." That meets the precise question here involved. To permit this appellant, who, on the record before us, and pursuant to the order and authority of the County Court, has taken the property of this estate, belonging to these minor heirs, and misappropriated and dissipated the same, to entirely escape an accounting on the ground that his appointment was a nullity, would be such a manifest outrage upon justice that requires neither authority nor discussion to show that it cannot be done.

The order of the District Court is in all things affirmed. All concur.

(81 N. W. Rep. 37.)

NICK SLUGA vs. ROBERT WALKER.

Opinion filed November 22, 1899.

Justices of the Peace—Loss of Jurisdiction.

A justice of the peace, who, after the trial of a case has been concluded, and the parties have rested, adjourns the case indefinitely, by such act of adjournment loses jurisdiction thereafter to render and enter judgment; and a judgment so entered is void, unless jurisdiction has in some manner been restored.

Appeal from District Court, Stutsman County; *Glaspell, J.*

Action by Nick Sluga against Robert Walker. Judgment for plaintiff, and defendant appeals.

Reversed.

Ormsby McHarg, for appellant.*S. E. Ellsworth*, for respondent.

YOUNG, J. Only one of the errors assigned in counsel's brief need be considered by us. This case was tried in one of the Justice Courts of Stutsman county on December 14, 1898, and without a jury. At the close of the trial, and after both parties had rested, the justice, on his own motion, adjourned all further proceedings in the case to an indefinite time, as is shown by the following docket entries: "The court delays entering judgment until a memorandum of deposition costs can be secured from Mandan, N. Dak." Then comes the following entry: "December 16, 1898. Memo. above mentioned received this day, and filed herein; and judgment is entered in favor of plaintiff and against the defendant," etc. The judgment then set out the amount of recovery and costs allowed, by items, all in proper form. The defendant appealed from the judgment so entered, upon questions of law alone, and included among the errors complained of, and specified in his notice of appeal, the specification that the justice lost jurisdiction to enter any judgment in the case, by failing to enter it at the close of the trial. The District Court ruled against the defendant, and affirmed the judgment of the Justice Court. Defendant appeals from the judgment of the District Court, and presents for review the same alleged errors of law as were before that court.

The legal duty which rests upon a justice of the peace upon the return of a verdict, or when a case is submitted to him for decision without the intervention of a jury, is declared in sections 6707, 6708, Rev. Codes, which read as follows:

"Sec. 6707. When a trial by jury has been had judgment must be entered by the justice at once in conformity with the verdict.

"Sec. 6708. When the trial is by the court, judgment must be entered at the close of the trial."

In the case at bar the trial was had on December 14th, and the judgment was entered on December 16th. Counsel for appellant contends that under the section last quoted the justice was without

jurisdiction to enter judgment at that time, in that the judgment was not entered at the close of the trial. Section 6707, *supra*, which is the same as section 6104, Comp. Laws, was before this court in *re Dance*, 2 N. D. 184, 49 N. W. Rep. 733, and was held to be mandatory, and, further, that a justice who failed to follow the express mandate of said section in entering judgment acted without jurisdiction. This is in accord with the almost unanimous voice of the courts. The cases differ to some extent, however, as to what amounts to a compliance with a statute which requires the entry of judgment at once, or forthwith, or immediately upon the return of a verdict. Wisconsin holds to a literal construction. Her statute requires the justice to render and enter judgment "forthwith" upon the receipt of the verdict. In *Hull v. Mallory*, 56 Wis. 355, 14 N. W. Rep. 374, that court said: "The word 'forthwith,' in this statute, has been construed, in the most emphatic manner, to mean instant, by this court, in several cases, and it is no longer an open question." The Iowa statute also requires the judgment on a verdict to be entered "forthwith." The Supreme Court of that state, in *Knox v. Nicoli*, 66 N. W. Rep. 876, held that: "The provisions of the statute that the judgment shall be entered 'forthwith' must be reasonably construed. A judgment upon a verdict entered at 9 o'clock at night may properly be entered the next morning." We think the construction of the Iowa court more nearly represents the purpose the legislature had in view in framing the statute in question, than the literal interpretation of the Wisconsin court. This, also, is the view of the Supreme Court of Minnesota. That court, in *Sorenson v. Swenson*, 56 N. W. Rep. 350, said: "The word 'forthwith,' in such statute, means within a reasonable time. We think the ends of justice will be better subserved by a liberal and equitable construction of the law and practice relating to Justice Courts, than by the adoption of a harsh and unbending rule of strict construction. We therefore hold that the word 'forthwith,' in the sections of our statutes quoted, means, as there used, that the judgment must be rendered within a reasonable time after the return of the verdict. What constitutes such reasonable time will depend upon the circumstances surrounding each particular case. There should be no unreasonable delay." This interpretation is supported by the weight of authority. *Burchett v. Casady*, 18 Iowa, 344; *Davis v. Simma*, 14 Iowa, 154. To the same effect is the case of *Huff v. Babbott* (Neb.) 15 N. W. Rep. 230. It will be noted, moreover, that section 6708 merely provides that judgment shall be entered at the close of the trial, and omits the words "at once," found in the section preceding, relating to the entry of judgment upon verdicts. This omission, however, in our opinion, makes the section no less mandatory in its requirement that the justice shall enter judgment at the close of the trial; but the omission of the words "at once" to a certain extent removes the inference that, in point of time, it must be entered immediately. In view of the fact that it may be absolutely necessary for the justice

to deliberate after the case is submitted to him, a requirement that he should enter judgment immediately would doubtless in some instances work injustice, and in others require an impossible act. As was said in *Huff v. Babbott* (Neb.) 15 N. W. Rep. 230: "The justice may require time to consider the evidence before rendering a judgment, and it may be necessary for him to do so before he is prepared to decide. If a decision is rendered before the justice has time to consider the evidence, there is great danger of his committing an error which more mature reflection would have enabled him to avoid." The most liberal construction of any of the courts requires, however, that the judgment shall be rendered and entered within a reasonable time, and without unnecessary delay. No uniform rule can be laid down as to what will be considered a reasonable time. Each case wherein a delay in entering judgment has occurred must be determined upon its own facts. Whether the delay in this case from the 14th to the 16th of December was reasonable and necessary, we do not determine, for the reason that we are agreed that the act of the justice in adjourning the case to an indefinite time operated to destroy his further jurisdiction, and that his subsequent acts were accordingly without authority. So far as we can learn, no judgment rendered and entered by a justice of the peace, at a time and place of his own choosing, after an indefinite adjournment, and without notice to the parties, has ever been upheld, where the question has been directly presented, and for very good reasons; for such an adjournment deprives the parties of substantial rights, and renders it legally impossible for them to be present and protect their interests. It is the right of the prevailing party to see that the judgment rendered in his favor is entered in legal form, and that such costs and disbursements as are legally taxable are embodied in the judgment. The defeated party has an undoubted right, also, to resist the allowance of such costs as he shall deem unlawful. He also has the right to know the fact that a judgment has been entered against him, and its amount, to the end that he may comply with it without further expense, or apply for a stay of execution, or appeal, if he shall choose to do so. The vice of an indefinite adjournment is that it utterly deprives the parties of these rights. On this point, in *Clark v. Read*, 5 N. J. Law, 571, Kirkpatrick, C. J., said: "I hold it to be clear that a justice cannot closet himself up, or, perhaps I might rather say, go about his usual business, and then give judgment when and where he pleases, in the absence of the parties, and especially at such a distant day. He must, like other judges, give judgment in open court, when the parties are present, or had an opportunity of being present." In *Harrison v. Chipp*, 25 Ill. 471, the court, in passing upon a case where a justice had taken a case under advisement for an indefinite time, said: "The law designs that the parties shall have the right to be present when every step is taken, and the officer has no power to deprive either party of that right. In this case the justice of the peace, by the

indefinite postponement of the cause, lost all jurisdiction over the parties, and was unauthorized to proceed to render the judgment. It, being unauthorized, was not binding on the parties, and was void." Later, the same court, in *Hall v. Reber*, 36 Ill. 483, in referring to the case from which we have just quoted, stated that: "The court did not design to decide anything, further than that a justice of the peace cannot take a case under advisement indefinitely. He can, unquestionably, like any other court, after the evidence and arguments are closed, adjourn the case for some fixed and reasonable time, to enable him to reflect upon the evidence or examine the law. It is merely necessary that an adjournment should be for a definite time, and should be announced in open court, that the parties may be present at the decision, in order to take such steps for the protection of their interests as they deem proper." So, too, in Wisconsin it is held that, unless the time and place to which the adjournment of a case is made are entered in the docket at the time of adjournment, the justice loses jurisdiction. *Roberts v. Warren*, 3 Wis. 736; *Brown v. Kellogg*, 17 Wis. 475; *Crandall v. Bacon*, 20 Wis. 639; *Grace v. Mitchell*, 31 Wis. 533; *Brahmstead v. Ward*, 44 Wis. 591. See, also, *In re Dance*, 2 N. D. 184, 49 N. W. Rep. 733. The case of *Heinlen v. Phillips* (Cal.) 26 Pac. Rep. 366, in construing a statute which is almost identical in language with section 6708, Rev. Codes, held that the requirement to render and enter judgment at the close of the trial is merely directory, and that a judgment rendered by a justice of the peace six weeks after the trial was valid. This case is not only wrong in principle, but is contrary to the weight of authority, as we have seen. It is entirely based upon a previous case (*McQuillan v. Donahue*, 49 Cal. 157), which case construed a statute requiring district judges, before whom fact issues were tried, to make and file their decisions within a limited time, and held that such statute was directory, merely. The vast difference which exists between District and Justice Courts (the former being courts of general jurisdiction, and the latter limited jurisdiction) leads us to question the soundness of the conclusion that the similar requirement as to justices of the peace is also directory, or that the legislature intended that a justice of the peace might take his own time to decide a case submitted to him, and render and enter his judgment when and where he pleased. On the contrary, it would seem that sections 6707 and 6708 were intended to make such abuses impossible, by requiring the justice to render and enter his judgments at times when the parties were, or could be, present.

In the case at bar, we hold that the justice, by indefinitely adjourning the case, lost jurisdiction thereof, and that the judgment which was thereafter entered some time on December 16, 1896, was rendered and entered without authority, and is void. The District Court is therefore directed to enter a judgment reversing its judgment and dismissing the action.

Reversed. All concur.

(81 N. W. Rep. 282.)

NATIONAL CASH REGISTER COMPANY *vs.* CHARLES E. WILSON.

Opinion filed November 24, 1899.

Trial De Novo—Statement of Case—Specifications.

A trial de novo cannot be accorded in this court when the record does not contain a statement of the case as provided for in section 5630, Rev. Codes, as amended by chapter 5 of the Laws of 1897, and having embodied therein the specifications required by said section.

Foreign Corporation May Sue.

A foreign corporation which has not complied with sections 3261, 3263, Rev. Codes, by filing a copy of its articles of incorporation in the office of the secretary of state, and by appointing the secretary of state as its agent for the service of process, may nevertheless maintain an action in the courts of this state.

Appeal from District Court, Cass County; *Pollock, J.*
Action by the National Cash Register Company against Charles E. Wilson. Judgment for plaintiff. Defendant appeals.
Affirmed.

Arthur B. Lee, for appellant.

D. H. Fisk, for respondent.

YOUNG, J. This is an action in claim and delivery, brought in the District Court, to recover the possession of a cash register of which plaintiff claims to be the owner. The case was tried to the court without a jury. Judgment was ordered and entered for plaintiff. Defendant appeals from the judgment, and evidently for the purpose of having a retrial upon the merits in this court, as appears from a statement to that effect in the brief of appellant's counsel. This cannot be accorded upon the record presented. The action was tried under section 5630, Rev. Codes, as amended by chapter 5 of the Laws of 1897. There appears in the record presented to this court no statement of the case, and no specifications of any particular facts to be reviewed. Neither has appellant specified that he desires a retrial of the entire case. This court has repeatedly held that in the absence of a statement of the case settled in pursuance of section 5630, as amended, and having embodied therein the specifications required by said section, this court is without authority to try the case *de novo*. *Bank v. Davis*, 8 N. D. 83, 76 N. W. Rep. 998; also, *Ricks v. Bergsvendsen*, 8 N. D. 578, 80 N. W. Rep. 768; *Erickson v. Bank*, 9 N. D. *infra*, 81 N. W. Rep. 46; and *Mooney v. Donovan*, 9 N. D. *infra*, 81 N. W. Rep. 50, decided at the present term.

Under these conditions, our authority to re-examine is confined to such intermediate orders or determinations of the trial court as involve the merits, and necessarily affect the judgment, and appear upon the face of the record transmitted to this court. Section 5627, Rev. Codes. Turning to the judgment roll, we find it em-

braces the complaint, an answer, and a demurrer to one of the defenses set up in the answer, an order sustaining the demurrer, order for judgment, and judgment. The record, then presents for review the correctness of the order sustaining the demurrer, and that question only. In the defense demurred to, the defendant alleges that that plaintiff had not complied with the provisions of sections 3261 and 3263 of the Revised Codes, with reference to filing a copy of its articles of incorporation or charter in the office of the secretary of state, and had not appointed the secretary of state as its agent for the service of process, as required by said sections, and for that reason cannot maintain this action. This court has had occasion to consider the question presented by this defense in three previous cases, and, after an exhaustive examination, the right of a foreign corporation, which has not complied with the requirements of the statutes referred to, to maintain actions in the courts of this state on an equal footing with resident persons and corporations, was upheld, and is now settled law. *Mill Co. v. Bartlett*, 3 N. D. 138, 54 N. W. Rep. 544; *Red River Lumber Co. v. Children of Israel*, 7 N. D. 46, 73 N. W. Rep. 203; *Savings & Loan Co. v. Shain*, 8 N. D. 136, 77 N. W. Rep. 1006. The demurrer was therefore properly sustained. No error appearing in the record, the judgment of the District Court is affirmed. All concur.

(81 N. W. Rep. 285.)

CONSTANTINE SCHWEINBER *v.* GREAT WESTERN ELEVATOR CO.

Opinion filed November 22, 1899.

Objection to Any Evidence Because of Insufficiency of Complaint Must Point Out Defect.

An objection to the introduction of any evidence, upon the ground that the complaint does not state a cause of action, made at the beginning of the trial, is insufficient. The attack at that stage of the case must be specific.

Mortgage of Future Crop—Statute.

Section 4681, Rev. Codes, was enacted to prevent taking mortgages on crops to be grown for an indefinite number of years. It never was intended to avoid a mortgage of the crop for the existing year, whether matured or not.

Presumption of Delivery.

In the absence of testimony, the law presumes that a chattel mortgage is delivered on the day of its date.

Appeal from District Court, Barnes County; *Glaspell, J.*
Action by Constantine Schweinber against the Great Western Elevator Company. Judgment for plaintiff. Defendant appeals.
Affirmed.

N. D. R.—8

P. H. Rourke, for appellant.

Winterer & Winterer, for respondent.

BARTHOLOMEW, C. J. Action in conversion by a mortgagee of certain wheat grown upon certain land in the year 1897. Complaint in usual form. Answer in denial, except that the defendant admits that at the time specified it purchased certain wheat of the mortgagor, and paid him therefor. Defendant introduced no testimony, but at close of plaintiff's testimony moved for a directed verdict in its favor. Motion denied, and the court of its own motion directed a verdict for plaintiff. From the judgment entered upon the verdict, defendant appeals to this court.

Certain errors of law are specified, the first being the overruling of defendant's objection made at the opening of the case to the introduction of any testimony, upon the ground that the complaint did not state facts sufficient to constitute a cause of action. We have held at this term (*Chilson v. Bank*, 9 N. D. 96, 81 N. W. Rep. 33), and it is well sustained, that this form of objection is not good. It points out no defects in the complaint, gives the court no opportunity to order an amendment, and gives plaintiff no opportunity to amend voluntarily. At that stage of the case the court cannot stop all proceedings until it can critically examine a complaint, however long, however involved and technical, to see that it contains every required averment. If a defendant elect to defer his attack upon the pleading until the taking of testimony is reached, he must make his objection specific.

The second error of law urged relates to the admission of certain testimony touching the grade of the wheat. It is claimed that the testimony was incompetent, because the grade was fixed at a mill, and not at an elevator. We know of no reason why one is not as competent as the other. There is no suggestion that there is any difference in the grades, whether made at the mill or at the elevator.

The third assigned error of law is based upon the rulings on the motion for verdict. No grounds for the motion were assigned, and we do not intend to pass upon its legal sufficiency, but assume it, for the purposes of the case. In the assignment it is urged that there was no proof that any crop matured on the land after the delivery of the mortgage. This is an attack upon the lien. Section 4680, Rev. Codes, reads: "An agreement may be made to create a lien upon property not yet acquired by the party agreeing to give the lien, or not yet in existence. In such case the lien agreed for attaches from the time when the party agreeing to give it acquires an interest in the thing to the extent of such interest." And the following section reads: "A lien by contract upon crops shall attach only to the crop next maturing after the delivery of such contract." In construing this statute, we must keep in mind the object of its enactment,—the evil that it was intended to cure. It was enacted to stop the practice which previously existed of taking chattel mortgages upon crops to be grown for an indefinite number

of years in the future. Its acts as a limitation, and never was intended to avoid a mortgage of a crop for the existing year, whether the crop was mature or not.

There is nothing in the point that there was no proof of time of delivery of the mortgage. It was dated August 2, 1897, and the law presumes, in the absence of proof, that it was delivered upon that day. 9 Am. & Eng. Enc. L. (2d Ed.) 152.

It is also claimed that there was no proof of demand and refusal, but this claim is without support in the evidence, as is also the claim that there was no proof of value. All of appellant's assignments of error are overruled, and the judgment of the District Court is affirmed. All concur.

(81 N. W. Rep. 35.)

JOHN STOREY vs. JOHN W. MURPHY, *et al.*

Opinion filed November 25, 1899.

Counties—Commissioners—Attorneys—Employment—Ultra Vires—Contract

This action is brought to enjoin Kidder county and its commissioners from paying out any money or transferring any land to the defendants Baker and Stanley pursuant to an alleged contract of employment entered into in November, 1897, between said Baker and Stanley and the commissioners of said county, by the terms of which said Baker and Stanley agreed as attorneys to prosecute necessary legal proceedings for the collection of certain taxes against the lands of the Northern Pacific Railway Company, situated in Kidder county. Said contract was made while said Stanley was state's attorney for said county, and by its terms Stanley and Baker were to receive as compensation for such services, out of the cash proceeds so collected, a percentage of 25 per cent. thereof, one-fifth part of which was to go to Stanley and the residue to Baker; and it was further stipulated by such contract, in effect, that one-fourth part of any real estate the title to which was obtained in the contemplated legal proceedings was to be transferred to said Baker and Stanley in the same proportion relatively to each. *Held*, under the circumstances, and for the reasons set out in the opinion, that said contract was ultra vires as to the county commissioners, and wholly void. *Held*, further, that the question whether county commissioners may, under their implied powers, and in the absence of statutory restrictions, employ special counsel to attend to matters in which the county is interested, is not involved in this case, and hence such question is not decided.

Laches in Bringing Suit—Right of Tax Payer to Restrain Unlawful Dissipation of Funds.

Held, further, that the right of a resident taxpayer to ask a court of equity to enjoin the unlawful dissipation of public funds is not lost, as a rule, by mere laches in bringing suit.

Commissioners' Employment of Private Counsel Void.

Held, construing section 7, chapter 67, Laws 1897, that, until answers have been filed pursuant to the provisions of said chapter, the power vested in county commissioners to employ additional counsel to assist the state's attorney in cases brought under said chapter does not arise; and accordingly *held*, that an attempted employment of

additional counsel made by resolution of the county board, such as appears in this case, was premature, and without legal effect, under section 7, inasmuch as it does not appear that any answer had been filed under said chapter 67 at the time said resolution was adopted.

When District Judge May Appoint Additional Counsel.

Section 1988, Rev. Codes, construed, and *held*, that in cases pending or to be instituted in the District Court in any county in this state in which the state's attorney is required to appear officially as counsel, and which are important cases, said statute invests the district judge with an exclusive discretion to appoint special counsel to assist the state's attorney; and in such cases the commissioners of the county are without authority to appoint special or additional counsel.

Attorney General—Duties—Appointment of Assistant Counsel Void.

Chapter 120, Laws 1897, construed. *Held*, under section 1 of said chapter, that in the cases in which the attorney general of the state is required to institute new actions or attend to pending actions relating to the collection of taxes upon the lands of the Northern Pacific Railway Company, that said official is given absolute control in the management of such cases, and that as to cases such as are so placed within the official control of the attorney general, the commissioners of counties interested in the collection of such taxes are without authority to employ special counsel to attend to the same, or to perform professional services in such cases.

Attorney General's Duty to Represent State in Supreme Court Cases.

Held, further, construing section 119, Rev. Codes, that it is the duty of the attorney general to represent the State of North Dakota in actions pending in the Supreme Court of the state, whether said actions are civil or criminal, and that tax cases come within the purview of said section.

Appeal from District Court, Kidder County; *Winchester, J.*

Action by John Storey against John W. Murphy and others and the State of North Dakota, intervener, to restrain defendants, as county commissioners, from paying defendants Fred A. Baker and Charles H. Stanley for services rendered by them as attorneys. From a judgment in favor of plaintiff, defendants appeal.

Affirmed.

Charles H. Stanley (Fred A. Baker, of counsel), for appellants.

Joseph W. Walker (James B. Kerr, of counsel), for respondent.

John F. Cowan, Attorney General, for the State.

WALLIN, J. In this action, which is brought for equitable relief, the plaintiff, by his complaint, prays for a permanent injunction restraining said defendants, the County of Kidder and its commissioners, from disbursing or paying over to said other defendants, Fred A. Baker and Charles H. Stanley, or to either of them, any money or county warrant, or transferring to them any land on account of professional services rendered by said Banker and Stanley, or either of them, pursuant to a certain contract, which is hereafter referred to and set out; and plaintiff further prays that said contract be surrendered up and canceled. The complaint avers, in

substance: First, that plaintiff is a resident and taxpayer in said County of Kidder; second, that there is lawfully due to said county and state a large sum of money, to-wit: about \$60,000, on account of taxes for the years 1889, 1894, 1895, and 1896, assessed against lands within said county belonging to the Northern Pacific Railway Company, which taxes plaintiff alleges on information and belief are valid and collectible, or largely so; third, that the defendant Fred A. Baker is an attorney at law, residing at Detroit, in the State of Michigan, and that the defendant Charles H. Stanley was at all times in question, and still is, the duly elected, qualified and acting state's attorney in and for said County of Kidder; that in the month of November, 1897, said defendant Fred A. Baker induced the County of Kidder and its commissioners to enter into a pretended contract with him, the said Baker, whereby it was agreed that said Baker should proceed to collect said arrears of taxes, and out of such taxes so collected said Baker was to receive as compensation for his services in collecting the same the sum of 25 per cent thereof. The complaint states that the said pretended contract was made in the following manner, to-wit: "On or about the 12th day of November, A. D. 1897, the said defendant Fred A. Baker addressed to the chairman of the board of county commissioners of said County of Kidder a proposition in writing, in the words and figures following, to-wit: 'Detroit, Mich., Nov. 12, 1897. Mr. J. W. Murphy, Chairman Board of County Commissioners, Steele, Kidder County, North Dakota—Dear Sir: In pursuance of my promise to your board, while in Washington I looked into the question whether the land grant of the Northern Pacific R. R. in Kidder county was subject to taxation in 1889 and since then, and I now advise you that the lands of that company have been subject to taxation ever since the railroad was built through the county on the line of its definite location. I have not yet got the exact date, but I know that it was long before 1889. As far as the claim of the company that its lands were not subject to taxation, until it obtained patents for the same, Nov. 4, 1895, and Jan. 11 and 17, 1896, is concerned, I am of the opinion that it is wholly without foundation, and no deduction from the amount due to the state and county should be made on that ground. In conducting the necessary legal proceedings to enforce the payment of the taxes due, I will need the services of your state's attorney, who should be paid something in addition to his regular salary, and I therefore submit this proposition: That I am to have twenty-five per cent of all money or lands recovered for the county on the taxes, interest, and penalties for the years 1889, 1894, 1895, and 1896, and one-fifth of this, or five per cent. of the whole, is to be paid or set off to Mr. C. H. Stanley, your state's attorney. The county is to pay all regular court expenses, including disbursements for witness fees, copies of records and briefs, and all the necessary expenses of the litigation, but not including my traveling expenses. I will furnish my professional services to whatever extent they may

be needed on the above terms. If this is satisfactory, please notify me at once. Your ob't servant, Fred A. Baker.' And the plaintiff avers that the said written proposition of the said defendant Fred A. Baker was laid before the board of county commissioners of the County of Kidder aforesaid at and during an adjourned regular meeting of said board on the 20th day of November, A. D. 1897, and that the said proposition was then and there accepted by resolution of said board, which said resolution or motion was then and is in the words following, to-wit: 'Moved and seconded that the proposition of Fred A. Baker, attorney at law, of Detroit, Mich., in regard to conducting the necessary legal proceedings to enforce the payment of certain taxes now due this county on lands of the Northern Pacific Railroad Company and its receivers, be accepted, and that the auditor be instructed to notify Mr. Baker accordingly; which motion was carried.' And this plaintiff shows to the court that the said pretended contract by and between said board of county commissioners and said County of Kidder on the one part and the said Fred A. Baker on the other part was then and is fraudulent and void, and that the same was then and is a violation of the statutes of the State of North Dakota in such case made and provided; that it was then and is wholly beyond the power of said board of county commissioners and of said County of Kidder to make or enter into any such contract as the pretended contract which is hereinbefore set forth; that said board of county commissioners and said County of Kidder was then and is now without authority to engage or employ any attorney in addition to the duly elected, qualified, and acting state's attorney of said county, except upon the appointment of and by the judge of the District Court, as provided by the Political Code of the State of North Dakota; and this plaintiff alleges that no such appointment of said defendant Fred A. Baker was ever made by the judge of the District Court for said Kidder county. And this plaintiff further alleges that the amount contemplated to be paid to the said defendants Fred A. Baker and Charles H. Stanley for the collection of said taxes is vastly in excess of any reasonable fee for the services agreed to be performed by said defendants under and by the terms of said pretended contract; that it is, and was at the time of the execution of said pretended contract, admitted by the aforesaid Northern Pacific Railroad Company and its receivers that a large proportion of the said taxes so due upon and against its said lands were legally levied and assessed, and were and are rightfully due and payable; and this plaintiff alleges that the services of a competent attorney in instituting and conducting and carrying on any and all litigation necessary to the prosecution of the claims of the County of Kidder for said taxes would not be reasonably worth more than from five hundred dollars to one thousand dollars, whereas the said pretended contract contemplates the payment, as such compensation, of the sum of ten thousand dollars to fifteen thousand dollars. And this plaintiff further alleges that the said pretended contract is con-

trary to public policy, for the reason that the same contemplates a contingent fee or compensation to be determined by the amount to be recovered, and for the further reason that the same contemplates that such fee or compensation shall be paid out of the identical moneys or lands that should be recovered. And by reason of all the foregoing facts the plaintiff alleges that said pretended contract by and between the said board of county commissioners and the said County of Kidder, on the one part, and the said defendant Fred A. Baker on the other part, was at all times and is wholly unauthorized and absolutely void. The plaintiff further alleges that he is informed and believes that the aforesaid Northern Pacific Railroad Company, or its receivers, intend to pay over to the said County of Kidder a large proportion of the said taxes due upon and against the said lands of said company, and included in said pretended contract with said defendant Fred A. Baker; and that the board of county commissioners of the said County of Kidder threaten and intend to pay over to said defendants Fred A. Baker and Charles H. Stanley the sum and amount of twenty-five per cent. of all such moneys so received, and that the said board of county commissioners will pay over to said defendants Baker and Stanley the sum and amount of twenty-five per cent. of all such moneys so received unless they be restrained and enjoined from so doing; that, if such payment be made by said defendants the board of county commissioners aforesaid and the said County of Kidder to said defendants Fred A. Baker and Charles H. Stanley, this plaintiff will be without remedy, and his burden of taxation will be largely increased by the waste and misapplication of the funds and assets of said County of Kidder." To which complaint said defendants answer jointly.

The great length of the answer (it covers twenty printed pages of the abstract) will prevent its full reproduction in this opinion, and we shall, therefore, give only the substance of such features of the answer as are, in our judgment, decisive of the case. The answer admits that the plaintiff is a resident and taxpayer of said County of Kidder; that taxes, as stated in the complaint, have been levied and assessed against the lands of the Northern Pacific Railway Company situated in said county, and in this behalf the answer states that the aggregate amount of such taxes, with interest and penalty added, was, on March 1, 1898, the sum of \$57,088.16, which amount the answer alleges was "at said date, and is still, due and payable to Kidder county; but that said county had not been able to collect the same, and that the only hope that said county has of collecting said taxes is through and by certain legal remedies and proceedings now being conducted by the defendants Charles H. Stanley and Fred A. Baker, as hereinafter more fully stated." The answer further sets out in detail the numerous difficulties which defendants allege the County of Kidder has encountered in its endeavors to collect said taxes respectively; and the answer, in this connection, narrates the history of certain litigation had in

the District Court of Kidder county and in this court, in which the question of the taxability of said lands had been inquired into by the courts. The answer further states, in substance, that, while the validity of said taxes had been announced in principle by the federal courts in similar cases, said county has hitherto been unable to secure the actual payment of said taxes, or any of them. The answer further denies that the receivers of the said railroad company intend to pay said taxes voluntarily, and allege that such is not their intention, but, on the contrary, that said receivers intend to resist such payment as long as possible, and intend not to pay until compelled so to do by the courts of last resort. Defendants admit that the contract set out in the complaint was entered into as stated in the complaint, and their answer alleges that "these defendants admit that at the end of the litigation the board of county commissioners intend, in good faith, to live up to and perform the contract with said Baker, and to pay over to him, for himself and the said Stanley, twenty-five per cent. of the amount received by them, or, if any part of the recovery is in lands, to transfer to them twenty-five per cent. thereof." Defendants deny that the services of a competent attorney in the matter of enforcing the collection of said taxes by legal proceedings would not be reasonably worth to exceed \$500 or \$1,000; and allege that the amount to be paid under said contract is uncertain, and dependent upon the total amount recovered, and that compensation under the contract is wholly contingent upon success; that said county was without funds, except from the proceeds of such taxes, with which to employ counsel competent for the work; and that, all things considered, the contract in question was as advantageous as could have been made by the county in view of the quantity and quality of the legal services required in the premises. Defendants admit that said Baker is a taxpayer of said county, and that he is an attorney at law residing at Detroit, Mich., and allege that the said Baker has been in active practice in the courts since his admission to the bar in the year 1867. Defendants deny that said contract is in any manner fraudulent, unauthorized, or void, or against public policy, and especially deny that the defendant Fred A. Baker ever induced or solicited said county board to enter into said contract other than at the request of said board to state the terms on which he would be willing to undertake the collection of the taxes in question. The answer expressly denies that said contract is in violation of the statutes of the state, and alleges that the contract is one authorized in terms by the statute of the state, and, further, that the same is a contract which the county commissioners could lawfully make in the exercise of their general powers as the governing board of the County of Kidder. Defendants further show that the performance of said contract contemplates and requires legal proceedings not alone in the District and Supreme Courts of this state, but also in the Circuit Courts of the United States for the District of Wisconsin and the District of North Dakota; also in

the United States Circuit Court of Appeals and in the Supreme Court of the United States. The answer expressly alleges that the defendants Baker and Stanley have entered upon the discharge of their duties under said contract, and in so doing have performed a large amount of professional work, and that said Baker has necessarily paid out \$500 in traveling expenses while so engaged, and that the county of Kidder has already expended \$1,000 in the payment of necessary court expenses incurred in the prosecution and defense of legal proceedings in the premises. Defendants further charge that said plaintiff knew and was well aware of the fact that the aforesaid legal work was under way and being done under said contract, and that he made no objection thereto within a reasonable time, nor until the complaint herein was filed, and that the action should be dismissed for the reason that the plaintiff has been guilty of gross laches in instituting this action. The nature and character of the professional work done and the legal proceedings actually instituted and engaged in by the defendants Baker and Stanley are set out in detail in the answer, and the answer states that "the defendants believe that if the said Baker, with the assistance of the said Stanley, can be permitted to continue said litigation until the end thereof, that the county will realize nearly, if not quite, all the taxes due to it; and that no settlement will be made except such as will be fair and just to the county, the civil townships, and school districts and the state."

It appears that plaintiff's counsel, upon proper notice, moved in the District Court that the defendants' answer to the complaint in this action "be stricken out as frivolous, and for final judgment in said action for and in behalf of said plaintiff, as prayed for in his complaint." This motion was based upon all the records and files in the action, including the complaint and answer. Subsequent to noticing said motion, and on the 11th day of July, 1899, the State of North Dakota was permitted to intervene as a party in said action, and said state thereupon adopted the complaint of the plaintiff as its complaint in intervention; and said answer of the defendants was accepted as the defendants' answer to the complaint in intervention, and upon said date the record shows "that said motion to strike out said answer and for judgment was brought on for hearing at a regular term of the District Court." All parties to the action were represented by counsel at the hearing of the motion and, the same having been regularly submitted for decision, said court made and filed its order herein, which order is, in substance, as follows: That the court found from the allegations of the complaint and answer that the material facts as stated in the complaint are true; and as conclusions of law based upon the facts as so found the court found that the contract in question was *ultra vires* and void, and "that the answer herein wholly fails to meet the equities of the complaint." The court further found as a legal conclusion from such facts that the plaintiff was entitled to all the relief demanded in the complaint. Pursuant to this order,

plaintiff entered a judgment, from which defendants have appealed to this court.

We first notice the fact that the order of the District Court directing the entry of judgment nowhere makes reference to that feature of the motion in which the District Court is requested to strike out the defendants' answer as "frivolous." It is, however, entirely clear that the court below did not in fact strike out the answer as frivolous, or at all; and it is equally certain upon the record that the foundation facts upon which the order for judgment rests consist of the admissions and allegations of fact embraced in the answer, when considered as responsive to the averments of fact set out in the complaint. In short, the trial court, in its order for judgment, treated plaintiff's motion as a motion for judgment upon the pleadings. Such a motion assumes that all facts which are material to a decision of the case, whether found in the complaint or answer, are substantially true as alleged. Counsel have discussed no question of practice in this court, but, on the contrary, have presented the whole case upon its merits, and upon the assumption that the averments of fact in the answer are to be considered by this court and acted upon as true, as was done by the court below. Proceeding upon this assumption, the inquiry arises whether the contract in question is or is not valid in law. In discussing this question it should be first noticed that upon this record no attack can be made upon the contract upon the ground either of failure of consideration or fraud; nor do counsel for the plaintiff contend in this court that the contract is vulnerable upon either ground. The facts, as pleaded, would warrant no finding of actual fraud, and, inasmuch as the disbursement to be made under the terms of the contract is contingent upon the collection of taxes, and the amount of such collection being necessarily uncertain, there could be no valid claim of a total failure of consideration. The contract was entered into by the county board by a resolution in due form adopted at a regular session, and the terms appearing in the resolution, in connection with the letter of Baker, are reasonably clear. In this case the record does not require the court to consider or determine whether, under all the circumstances existing when the contract was made, the same was a prudent measure on the part of the commissioners. The contract is not attacked upon the ground that the same is unwise, inexpedient, or fraudulent in fact. Nor do courts ordinarily sit to supervise and correct official discretion in a case where officers are authorized to exercise an official discretion. The crucial question in the case is whether the contract, as made, or attempted to be made, is a legal contract. If this question, under the law, must be answered in the affirmative, the judgment of the trial court must be reversed; if not, it must be affirmed. The question presented is somewhat complicated in its nature, and one not free from embarrassment. We will first dispose of a preliminary point made by the appellants' counsel. Counsel allege and claim that the plaintiff has been guilty of laches

in instituting this action, and for that reason that the action should be dismissed, and cite in support of this contention two early cases in Massachusetts: *Tash v. Adams*, 10 Cush. 252, and *Fuller v. Inhabitants of Melrose*, 1 Allen, 166. These authorities seem to sustain the views of counsel. Nevertheless we are of the opinion that the weight of modern authority, which concedes to the resident taxpayer the right to intervene on his own behalf as well as on behalf of the public, and invoke the powers of a court of equity to prevent the unlawful dissipation of the public funds, does not recognize the earlier doctrine of laches which defendants seek to invoke. In our judgment, no laches on the part of taxpayers or others can operate to confer authority upon the officials of a corporation in a case where such officials are wholly without power to act. See Beach. Pub. Corp. § 248; *Northern Bank of Toledo v. Porter Tp. Trustees*, 110 U. S. 608, 4 Sup. Ct. 254, 28 L. Ed. 258; *Trester v. City of Sheboygan*, 87 Wis. 496, 58 N. W. Rep. 747; *Cullen v. Town of Carthage*, 103 Ind. 196, 2 N. E. Rep. 571. This court has recently had occasion to consider the same question, and have reached the conclusion that laches does not ordinarily prevent the intervention of a taxpayer to enjoin a disbursement of public funds about to be made without the authority of law or in defiance of law. See *Engstad v. Dinnie*, 8 N. D. 1, 76 N. W. Rep. 292. Nor (if this action should be dismissed without a decision upon the merits, and on account of the laches of this plaintiff) are we able to see any reason why another action for the same relief might not be instituted by some taxpayer and resident who has not been guilty of laches in the premises. If this be true, it would certainly not be in furtherance of justice to dismiss the present action without determining the merits. It is alleged in the answer, in substance, that prior to the date of entering into the contract in question the receivers of the Northern Pacific Railroad Company had instituted two actions in the District Court for the County of Kidder, one of which was commenced on the 2d day of December, 1896, and the other on the 7th day of July, 1897; that the defendants in the first action were the county auditor and county treasurer of Kidder county and the State of North Dakota, and that said action was brought to enjoin the collection of certain taxes assessed against said lands in the year 1892; but it is alleged that this action was brought in fact as a test case, and with a view to obtain a decree which would, in effect, cover all the lands in question, and declare that the same were not legally taxable for any of the years in question. The answer further states, in substance, that said action which was instituted on the 7th day of July, 1897, was brought by said receivers against the County of Kidder and States of North Dakota to vacate and set aside any and all rights or liens which the county or state had or may have at any time acquired by virtue of any tax proceedings against the lands in question. It is not alleged that any professional services were performed under said contract in

the action commenced in December, 1896, but it is alleged that services to a large amount were rendered pursuant to the contract in the defense of the other action. With respect to both of said actions, it appears that they were instituted on account of Kidder county taxes assessed against the lands in question. The actions were instituted in Kidder county, and the state was a party defendant in both actions. It is therefore entirely clear that both of said actions were actions in which, under express statutory provisions, it was the official duty of the state's attorney to appear and represent the defendants as counsel. See subdivision 3, § 1979, Rev. Codes. It appears by the answer, and the fact is obviously true, that both of said actions were cases of unusual importance with reference to the financial interests of Kidder county. A very large sum was directly involved, and a question of paramount importance with reference to the taxability of the lands in question was likewise involved. Under such circumstances it might well be said that special counsel was needed, and should have been secured, to assist the state's attorney in defending the interests of the defendants in said actions, and the legislature has anticipated that contingencies might arise similar in character, and to meet the same have made definite provisions for the employment of special counsel to assist the state's attorney. We do not here refer to the authority of the District Court to appoint a state's attorney in cases where there is no such officer, or where the state's attorney is absent, or unable to attend to his duties; nor do we now allude to the statutory right of a state's attorney to appoint an assistant state's attorney; but we do refer to the express authority given to the judge of the District Court by section 1988 of the Revised Codes, which section is as follows: "The judge of the District Court may, in his discretion, appoint special counsel to assist the state's attorney in important cases. Such special counsel shall be paid a reasonable fee therefor, to be approved by the court and paid by the county for which the services were rendered." Upon the facts stated in the defendants' answer, an appointment by the district judge under this statute would, without question, have been a proper exercise of official discretion. But no such appointment is claimed to have been made or asked for. Under these circumstances this court has no hesitation in holding that the district judge, under section 1988, supra, was vested with a discretion which was exclusive as to the appointment of special counsel to assist the state's attorney in the defense of the two actions in the District Court to which we have referred. The actions were important, and they were such actions as fall within the official authority of the state's attorney, and hence the actions were "important cases," which came within the plain letter and meaning of section 1988. In such actions the legislature has seen proper to vest in the district judge a discretion to appoint special counsel, and to provide that such counsel shall be paid out of the county treasury. Nor does such payment at all depend

upon the approval of the county commissioners. This discretion is necessarily exclusive, and we so hold, but in doing so we do not desire to express or intimate an opinion as to the question of the general authority of county commissioners to employ counsel in matters affecting the interests of their county which do not come within the purview of said section 1988. Upon this feature of the case our conclusion is that the county commissioners were without authority to employ Messrs. Baker and Stanley to attend to the two cases brought by the receivers, and we may with propriety add that, in so far as the contract in question authorized payment out of county funds or property to the state's attorney, Stanley, for any services in either of said actions, the same violated an express provision of the statute under which the salary of that officer was fixed by the legislature at the time said contract was made. Rev. Codes, § 2058. See, also, Id. § 1983.

But counsel for defendants make the further point that the county commissioners were expressly authorized by law to make the contract in question, and in support of this contention cite chapter 67 of the Laws of 1897, which law was in force when the contract was made. It does not appear that the commissioners, in entering into this contract, had this statute particularly in mind; nor does it appear that either Baker or Stanley ever performed any professional services in any case or cases arising under chapter 67 of the Laws of 1897. But let it be conceded that the contract is broad enough in its terms to cover any services which could be performed under the provisions of said chapter; nevertheless we are unable to see how such a construction of the contract can aid the defendants. Defendants rely upon a clause of section 7 of said chapter, which reads as follows: "But the county commissioners of the county in which such taxes are laid may employ any other attorney to assist such state's attorney therein." A careful reading of said section 7 in connection with the other provisions of said law of 1897 discloses the fact that no services are required to be performed by the state's attorney under the act until an answer has been filed setting forth a defense or objection to the tax sought to be put in judgment pursuant to the act. If no answer is filed in any given case arising under the statute, a judgment is entered by the clerk of the District Court as upon default, and in such default cases all duties required to be performed under the act are intrusted to ministerial officers, and no appearance in court is needed or permissible in such cases. But upon joinder of issue by the filing of an answer it becomes the duty of the state's attorney to act and proceed with all convenient dispatch to have the issue so formed determined by the court, and in such cases the state's attorney is officially in charge of the prosecution, and it is with reference to such cases that the statute declares in the language we have quoted from section 7 that the commissioners may employ counsel to assist the "state's attorney therein." In the case at bar there is nothing to show that any answer was ever

served in any case arising in Kidder county under chapter 67. We think the burden was upon the defendants in this case to show that the circumstances named in the statute, and under which additional counsel might be employed, actually existed at the time the alleged contract of employment was made. This the defendants have not attempted to do, and hence we shall hold that the defendants can find no support for their defense in the statute under consideration. We may also add, in this connection, that any compensation paid under the contract to the defendant Stanley for services rendered under the act of 1897, would be illegal under the provisions of the statutes above cited. As state's attorney for Kidder county, all such services were compensated in the official salary received by him, such services being strictly official services. Chapter 67 of the Laws of 1897 was created to meet a serious condition of affairs with respect to the collection of a mass of overdue taxes for the year 1895 and prior years, which for one reason or another had not been collected. To accomplish the collection of such taxes, the act provided a proceeding in court whereby a judgment could be obtained for all such taxes as were valid, and upon such judgment the lands against which such taxes were assessed could be sold. This law was not only an efficient remedy for the collection of all taxes assessed in 1895 and prior years, but was, as held by this court, the only remedy in cases where lands had been sold for taxes, and bid in for the state or county, and had not been redeemed. See *McHenry v. Kidder Co.* 8 N. D. 413, 79 N. W. Rep. 875. Under this statute the only legal means open to Kidder county for the collection of the taxes for 1889, 1894, and 1895 was by the machinery provided by the act of 1897. The taxes of 1896, which were lawfully assessed and levied, could, of course, be collected by means of a sale of the land in manner and form as the law directs. These methods of collecting taxes as provided by the laws of the state are not only appropriate, but the same are exclusive of other legal means of enforcing payment of taxes. See *McHenry v. Kidder Co.*, *supra*.

It appears, however, that Messrs. Baker and Stanley have petitioned the Circuit Court of the United States which appointed said receivers to pay such taxes, and in so doing have performed services and expended money, but in this connection the answer alleges, in substance, that such receivers do not intend to pay said taxes "until they are compelled to do so by the judgment of the highest courts to which the litigation may be carried by them." If this be the disposition of said receivers,—and it so appears,—it is entirely clear to use that the receivers will not pay the taxes in question until the courts of this state have declared the same to be valid and legal taxes in proceedings instituted under the laws of this state. It is apparent, then, that the county commissioners, in entering into the alleged contract of employment, had in contemplation only such legal services as were appropriate and es-

sential to the collection of taxes under the laws of this state. The courts of this state have the primary right at least of declaring whether alleged taxes levied on land within the state are or are not valid. It must, therefore, in our judgment, be conclusively presumed that the defendants were employed to attend to suits brought in the courts of this state, and that the compensation which the contract provided was to be paid over for such services, and was not to be paid for on account of any isolated venture in the federal courts, such as was made by filing said petition in the Circuit Court of the United States. The contract is in solido, and when construed as a whole, it is found that the major part of the services contemplated by it cannot, for reasons already pointed out, be paid for out of the county treasury. We therefore hold that the said services performed in the Circuit Court of the United States cannot be made available as a means of validating the alleged contract of employment.

It will follow from considerations already suggested in this opinion that the alleged contract of employment is *ultra vires* and void; but our conclusion in the case has been much strengthened by a perusal of another statute, which, for some reason, not apparent to the court, counsel have omitted to cite. We refer to an act of 1897 found in chapter 120 of the Laws of that year. This statute was enacted for the express purpose of facilitating an amicable adjustment of long-standing differences between the state and the Northern Pacific Railroad Company and the receivers of that company, relating to uncollected taxes which had from year to year been assessed against the lands of the company by county officials in which such lands were situated. Such adjustment as was contemplated, if made, would include all uncollected taxes on such lands assessed prior to the passage of the act, and would, of course, include all taxes involved in this action. It is a matter of common knowledge that a number of the counties interested have, since the passage of the act, adjusted and compromised their said differences with the railroad company and its receivers, but it seems that Kidder county has not succeeded in doing so. But we call particular attention to a provision of said act found in section 1 thereof; which reads: "And in case of failure of said commission to reach such agreement, adjustment or compromise on or before the 1st day of July, 1897, the attorney general is hereby instructed to take charge of all the pending litigation between the state and the counties thereof and either of said companies or said receivers and press the same to as speedy a determination as possible." We think the provision we have quoted, when read in connection with the whole statute, contemplates and provides that as to such of said controversies over uncollected taxes as are not adjusted pursuant to the terms of the statute, the same are to be given over to the attorney general of the state with a view to their speedy determination in the courts, and in all courts, whether state or federal, in which such controversies were pending or might be brought. The aim of the statute

was, manifestly, to make provisions for concluding and ending all controversies with said railroad corporation over uncollected taxes. If this construction of said statute is correct, it would follow that the attorney general would be held responsible for the proper control and management of all actions growing out of such controversies as were not adjusted amicably under the terms of the act or otherwise compromised. As to cases falling within the official control of the attorney general, it is obvious that no other attorney could intervene, and take charge of the same as counsel. Hence for such cases the county commissioners would certainly have no right to employ other counsel, and there would be no necessity for doing so. We might add that under a general statute prescribing the duties of the attorney general of this state such officer is expressly required to appear in this court in all cases, civil or criminal, pending in this court, in which the State of North Dakota is a party. See Rev. Codes, § 119.

Counsel for the plaintiffs point out a number of other objections to the legality of the alleged contract, but we deem it unnecessary in this case to formally pass upon the same, and we will therefore, in deference to counsel, simply refer to them, and say that we deem them well worthy of serious attention. Counsel claim that the practice of farming out the public revenues for collection to attorneys who agree to collect upon contingent fees is most injurious, and is against a sound public policy; citing *Platte Co. v. Gerrard* (Neb.) 11 N. W. Rep. 298, which case strongly supports this contention. Again, it is contended that the contract in question is certainly illegal in part, as it provides for paying the state's attorney out of the public funds a bonus for services which are within his official duty, and for which he is compensated by an official salary. Counsel further claim that the contract is illegal, because by its very terms it requires that the fees agreed to be paid to Stanley and Baker are to be deducted from the identical proceeds of taxes collected by them, a large part of which proceeds do not, under the law, belong to Kidder county, but do belong to the state and certain other political bodies located within the County of Kidder. Again, it is urged that the fees to be paid out consist not only of a percentage of cash collected, but also of lands the title to which might be acquired by the legal proceedings contemplated under the contract of employment. In this connection it is urged that no statute of the state authorizes the conveyance of any land by county commissioners to any person whomsoever without a vote of the people, and upon this point is cited Rev. Codes, § 1905. We need not pursue the matter further. It follows, upon grounds already fully stated, that the judgment entered by the trial court is entirely proper, and the same will therefore be affirmed. The other judges concurring.

BARTHOLOMEW, C. J. I concur in the result announced in this case, and the grounds upon which I concur are stated in the opinion of the court, but are therein so connected with other grounds, to

which I do not care at this time to stand committed, that I desire to specify and briefly restate the reasons for my concurrence. The case involves only the question of the power of the county commissioners of Kidder county to bind the county by the contract entered into by said commissioners in behalf of said county with the defendant Fred A. Baker, and which said contract is embodied in the letter of said Baker to the chairman of the said board dated November 12, 1897, and the resolution of said board accepting the offer contained in said letter, which said resolution is dated November 20, 1897. By that contract Baker agreed to give his professional services to any extent that might be necessary for the collection of the delinquent taxes of the years 1889, 1894, 1895, and 1896 against the lands of the Northern Pacific Railroad Company or its receivers, situate in said county. For such services he was to receive 25 per cent. of all money collected upon such taxes or of all lands taken in satisfaction thereof. A certain portion of this amount the county was authorized to pay to Charles H. Stanley, the state's attorney of said county, whose services Mr. Baker stated he would require. I find here no contractual relations between the county and Mr. Stanley. The compensation was all due to Mr. Baker, but he authorized the county to pay a portion of it to the attorney whom he employed to assist him. I find in the answer no such allegations of laches as should defeat plaintiff in this case, but I do not go to the extent of holding that a private person suing as plaintiff is suing in this case may not, by his laches, bar himself from setting up the plea of *ultra vires*. I do not think the point is involved.

What may have been done under this contract, or what at the time of its execution the parties may have expected would be done under it, is not, in my judgment, at all controlling in this case. There is no element of fraud in the contract. Everything was done openly. It was a notorious fact that differences of opinion between the Northern Pacific Railroad Company and the officials of the counties in which it owned lands as to the validity of taxes assessed upon these lands had long existed. These taxes, in one form or another, had been in litigation for ten or twelve years. But for certain statutes, to be noticed later, the contract would, in my judgment, have been an entirely proper one to make. Still, as I view it, the commissioners were without authority to make the particular contract. But I do not base this conclusion upon the fact that there was in that county a duly elected and qualified state's attorney; nor upon the fact that such state's attorney may appoint a deputy; nor upon the fact that the District Court may appoint a state's attorney to act temporarily; nor upon the fact that the District Court may, in important cases, appoint counsel to assist the state's attorney. It may be that these provisions may receive the force and effect intended by the legislature, and yet not deprive the board of county commissioners of all power to

employ counsel under any circumstances. While that board stands charged by law with responsibility for the proper management of the fiscal affairs of the county, with express power to institute and maintain suits for and in behalf of the county, it ought to require clear language to deprive it of the means for the proper performance of the duties with which it stands charged. Nor have I any sympathy whatever with the argument pressed upon the court that the power to employ counsel in the hands of county commissioners is liable to abuse. I know of no other class of officials brought so directly in contact with their constituents as county commissioners, and of no other class of officials held so strictly responsible for official action by their constituents as county commissioners. I am confident that experience will not justify any gratuitous fling at their discretion or integrity in this connection.

But the contract of employment here involved, and which was entered into in November, 1897, was for a specific purpose, to-wit: the collection of the delinquent taxes against the lands of the Northern Pacific Railroad Company, or its receivers, for the years 1889, 1894, 1895, and 1896. There was no specific part of the consideration for any specific part of the services, but all of the consideration for all of the services. It cannot be separated. But as to the collection of the taxes for the year 1895 and all prior years the legislature had, by chapter 67, Laws 1897, made special provision. Under that chapter the state and the various counties were deprived of any rights growing out of purchases by the state or county of any lands at tax sales for delinquent taxes of any of said years, and all such sales were annulled, and the original taxes restored, as if no sale had been made. *McHenry v. Kidder Co.* 8 N. D. 413. 79 N. W. Rep. 875. In Kidder county, as I understand it, all the railroad lands that had been sold for the taxes of 1895 or prior years had been bid in by the county; hence the act of 1897 operated upon all such sales, and the land stood, when said contract was made, simply as land upon which the taxes were delinquent for those years. In the *Kidder County Case*, above cited, we held that the collection of such delinquent taxes could be enforced only under the provisions of said chapter 67. It is true the answer in this case sets up various services that have been performed in the federal courts looking toward an order upon the receivers to pay such taxes. But the whole record shows that such taxes are not paid for the reason that their validity is disputed. Of course, the federal court will not order its receivers to pay the taxes while their validity is disputed, and that question can be litigated only in the courts of this state, and, as we have held, must be litigated under said chapter 67. It follows that the services to be performed under the contract must be rendered under the provisions of that statute. But that statute states under what circumstances the county commissioners may employ assistant counsel to act under its provisions. Of course, that excludes the power to employ counsel for the purposes named, under any other conditions. The act

contemplates the procurement of judgments in *rem* in the District Courts against the several tracts of land upon which the taxes are delinquent. The county treasurer is directed to file a list of such tracts with the clerk of the court. This list serves as a complaint in the action. Service is made by publication of the list, and a notice as directed. Any party interested may file answer setting forth the reasons why such taxes or penalties should not be enforced as against any particular tract or tracts of land. The statute provides that the issues thus raised may be brought to a speedy trial upon notice of the state's attorney, and adds: "But the county commissioners of the county in which such taxes are laid may employ any other attorney to assist such state's attorney therein." Laws 1897, chapter 67, § 7. The entire record in this case negatives the idea that Mr. Baker was employed to assist in the trial of the issues as thus joined, and it was not in the power of the board of county commissioners to employ him for any other purpose in connection with the collection of such taxes. If the railroad company or its receivers had instituted or should institute proceedings looking to the cancellation of the taxes for said years, or any of them, the defense of such proceedings had been fully provided for by chapter 120, Laws 1897. In the preamble to that act it is declared, in effect, that the validity of all unpaid taxes on Northern Pacific Railroad lands that had been assessed and levied prior to the date of the act was disputed, and the same were then in litigation, and the act declared that as to all of such taxes as should not be compromised or adjusted prior to July 1, 1897, the attorney general should take charge of such litigation, and press the same to a speedy determination. As to such litigation, it was, of course, beyond the power of the county commissioners to supersede the attorney general. It thus appears that for all litigation that could possibly arise touching these taxes, whether instituted by the counties to enforce their collection or by the landowners to resist their collection or procure a cancellation, special provisions had been made. The board of county commissioners, in making the contract here involved, did not act under or within those provisions. For these reasons I concur in the affirmance of the judgment of the District Court.

(81 N. W. Rep. 23.)

EMMONS COUNTY vs. C. C. BENNETT.

Opinion filed December 1, 1899.

Tax Deed—Delinquent Taxes.

In the absence of a statute to the contrary, a tax deed regularly issued cuts off delinquent taxes for years previous to that upon which the deed is based.

Prior Delinquent Taxes Cut off by Tax Deed.

A county is seeking to secure judgments against certain lands for delinquent taxes thereon under the provisions of chapter 67 of the

Laws of 1897. It appears that the land involved was sold to the county under article 19 of chapter 15 of the Compiled Laws, which authorized counties to become purchasers at tax sales. The sale to the county was in 1888 for the tax of 1887. In 1889 the same land was sold to an individual purchaser for the tax of 1888, who paid all subsequent taxes, and received a tax deed, which is conceded to have been regularly issued. *Held*, that the tax deed so issued cut off the rights of the county under the prior sale, and such county is not entitled to judgment for said taxes.

Appeals from District Court, Emmons County; *Winchester, J.*

Actions by Emmons County against C. C. Bennett (three cases) to recover land sold to defendant for taxes. From a judgment in favor of plaintiff, defendant appeals.

Reversed.

Horner & Stewart, for appellant.

George M. Register, State's Attorney, for respondent.

YOUNG, J. The question presented in the above appeals is the same. This opinion will therefore govern the disposition of all three cases. The appeals are from tax judgments rendered by the District Court of Emmons county against certain lands situated in that county, under chapter 67 of the Laws of 1897, and are certified to this court under section 10 of said chapter, which authorizes such certification when the trial court shall deem the questions involved of great public importance, or likely to arise frequently, and application is made therefor. We will state only the facts relative to the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, and the N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$, of section 4, township 129 N., of range 79. It is stipulated that Cassius C. Bennett, who resists the entry of judgment against the land just described, received a treasurer's deed of said land on February 28, 1893, based upon a sale of the same in 1889 for the taxes of 1888, and that he has paid all taxes thereon since 1888. The stipulation also concedes the regularity of all the proceedings which culminated in the tax deed, and the validity of the deed itself. The claim of the county is for a tax prior to that under which Bennett acquired his deed, namely, for the tax of 1887. On this point it is agreed that in 1888 the County of Emmons became the purchaser of said lands for the tax of 1887, and that a certificate of sale was duly issued to it by the county treasurer, and that no deed was ever issued thereon to it, and no steps were taken by said county to protect the interests acquired by such purchase; neither has redemption been made from said sale. The judgment authorized to be rendered by the statute under which these proceedings are had is against the land, and constitutes a lien thereon as against the estate or interest of every person whatsoever, so that the effect of a judgment for the county upon the facts in the cases before us would be to declare the rights of Bennett acquired by his purchase for the 1888 tax altogether subordinate to the prior sale to the county for the 1887 tax. It may be stated as an established principle that the interest which a purchaser of lands at a tax

sale acquires is, in the absence of a statute to the contrary, freed from liability for delinquent taxes of previous years, and that a tax deed regularly issued cuts off all interests acquired by purchasers at tax sales for taxes prior to that upon which the tax deed is based. *Preston v. Van Gorder*, 31 Iowa, 250; *Bowman v. Thompson*, 36 Iowa, 505; *Kessey v. Connell* (Iowa) 27 N. W. Rep. 365; *Meldahl v. Dobbin*, 8 N. D. 115, 77 N. W. Rep. 280; *Jarvis v. Peck*, 19 Wis. 74; *Sayles v. Davis*, 22 Wis. 225; *Irwin v. Trego*, 22 Pa. St. 368; *Huzzard v. Trego*, 35 Pa. St. 9; *Anderson v. Rider*, 46 Cal. 135; *Law v. People*, 116 Ill. 244, 4 N. E. Rep. 845. There could be no question that the 1887 tax, which the county now seeks to enforce, would have been cut off by the sale to Bennett for the tax of 1888, if the purchaser had been an individual instead of the county. That is conceded. But counsel for the county contends that the interests which the county acquired by its purchase were not subject to be lost by a subsequent sale for a subsequent tax like individual purchasers. We think otherwise. All of the proceedings relative to the taxes in question were governed by the Compiled Laws of the then territory. By section 1630 the county treasurer was authorized to bid off lands at tax sales in the name of the county, in the absence of other bidders. Said section declares that the county acquires "all the rights, both legal and equitable, that any other purchaser could acquire, by reason of said purchase." Section 1632 authorized an assignment of the county's certificate to any person who would pay the taxes, penalty, interest, and costs of sale and transfer, and declares that such "assignment and transfer shall convey unto said purchaser all rights of said county, both legal and equitable, in and to said real estate, as much so as if he had been the original purchaser at said tax sale." These provisions do not seem to leave room for doubt that it was the legislative purpose to create an authority in the county to become a purchaser on the same basis as an individual, in the contingency of there being no private bids. This being true, it does not alter the rights of the purchaser at a subsequent sale to show that there may have been a legislative omission in not guarding the right of the county in its purchase against loss by a sale upon a subsequent tax. It is contended, too, that Bennett's rights were expressly subject to those of the county, under the statute. Section 1638, after providing for the issuance of tax deeds, declares that a deed so issued "shall vest in the grantee an absolute estate in *fee simple* in such land, subject, however, to all the claims which the territory may have thereon for taxes or other liens or incumbrances. We are of the opinion that the claim for taxes or liens in this section relates entirely to those coming into existence subsequent to the tax upon which the deed is issued. This was the interpretation given to a similar statute by the Supreme Court of Wisconsin. In *Sayles v. Davis*, 22 Wis. 225, the court said: "The words, 'subject, however, to all unpaid taxes and charges,' in section 25, chapter 22, Laws 1859, have reference only to such unpaid

taxes and charges as may have accrued subsequently to the sale on which the deed is issued." We accordingly have reached the conclusion that the interest acquired by the county by its purchase at the tax sale was effectually cut off by the sale and delivery of a tax deed to Bennett upon a subsequent tax, and therefore the county is not entitled to judgment. The facts being similar, the judgment of the District Court in each of the cases above entitled is reversed. All concur.

(81 N. W. Rep. 22.)

EUGENE S. OWEN AS ADMINISTRATOR vs. E. C. COOK, *et al.*

Opinion filed December 1, 1899.

Negligence—Question for Jury—Exception.

Ordinarily, in an action to recover damages for negligence, the question whether the acts complained of constitute negligence is for the jury. This is not the case, however, when it is apparent that fair-minded men would not infer negligence from the facts proved.

Fires—Proximate Cause of Loss.

A person whose property is threatened with imminent destruction by fire may take such steps for its protection as are reasonable and proper, if his acts aid or contribute to the destruction of another's property, he will not be liable as for its negligent destruction. The fire from which, without negligence, he seeks to protect himself, will be considered as the direct and proximate cause of the loss, and also the cause of his acts.

Back Fire—Destruction of Property Thereby—Proximate Cause.

The defendants, when on a hunting expedition, encamped in a vacant house which was situated in an open prairie. A prairie fire originated near the house, and threatened its destruction and the destruction of defendants' property. A back fire was set by them near the house, and allowed to run until it joined the main fire, which destroyed the property of plaintiff's intestate. *Held*, under the facts stated in the opinion, that the original fire was the proximate cause of the loss, and that the acts of the defendants in back-firing were not negligent, and are wholly insufficient to sustain a verdict for the plaintiff for the negligent destruction of the property.

Appeal from District Court, Kidder County; *Winchester, J.*

Action by Eugene S. Owen, as administrator of the estate of Eleazer Shoemaker, against E. C. Cook and others. Judgment for plaintiff. Defendants appeal.

Reversed.

John E. Greene, for appellants.

Newton & Smith and *Alexander Hughes*, for respondent.

YOUNG, J. The plaintiff prosecutes this action as the administrator of Eleazer Shoemaker, deceased, to recover damages suffered by the latter during his lifetime in the destruction of certain buildings and other property in a prairie fire which occurred on October

6, 1897, in Kidder county, about 11 miles from Dawson. The complaint charges the defendants with negligently starting the fire which caused the destruction of the property in question, and also with negligence in permitting it to escape from the place where it was started. The answer denies that the defendants started, or caused to be started, the fire described in the complaint, and denies that plaintiff's intestate sustained any damage by reason of any act or omission on the part of the defendants. The case was tried in the District Court to a jury, and a verdict was returned against the defendants in the sum of \$900. A motion for a new trial was made in the District Court, based upon the alleged insufficiency of the evidence to sustain the verdict. No question was raised as to the pleadings, and no errors were specified on the admission of evidence. It was conceded in the motion that the property of plaintiff's intestate was destroyed by prairie fire at the time and place alleged in the complaint, and that the property so destroyed was of the value of \$900, as found by the jury. Defendants' entire contention was and is that the evidence is insufficient to charge them with responsibility for the fire which occasioned the loss in question. The motion for a new trial was denied, and judgment was entered against the defendants upon the verdict. This appeal is from the judgment and the order overruling the motion for a new trial, and presents for review the same questions that were before the trial court in the motion for new trial.

The record shows that the five defendants were residents of the State of Illinois, and that they came as a party to Kidder county for the purpose of hunting, and that they arrived in Dawson, in said county, on October 6, 1897, and there secured the services of one Chris Wisner and his brother, with their teams, to convey them and their hunting and camping outfit to their hunting grounds. It appears that they went immediately to a small lake, called "Kilby Lake," about 14 miles distant from Dawson. Wisner had secured permission for the party to occupy a vacant house which was located at the south end and on the east shore of the lake, and about 20 rods from the southeast shore. The party arrived at the house at 11 o'clock in the forenoon, or a few minutes later, and at once proceeded to unpack their outfit and settle themselves in the house which was to be used as their camp and headquarters. Kilby Lake is a small body of water, perhaps 50 rods wide and one-half mile long, extending almost due north and south. All of the country surrounding the lake for varying distances was then unbroken prairie, covered with dead and dry grass. The buildings and property of plaintiff's intestate, which were destroyed by fire on that day, were situated two and three-fourths miles almost due south of the south end of Kilby Lake, where the defendants were camped. From Kilby Lake to where the property in question was burned, and beyond, it was open prairie. There was a stiff wind on that day, coming from the north, a little west of north; traveling, as estimated by one of the witnesses for plaintiff, at 20 miles an hour.

During the time when defendants were settling their belongings in the Kilby house, and about 11:30 a. m., a smoke was seen to arise on the prairie about a quarter of a mile northeast of the house, in a depression between two small hills or knolls which concealed the fire itself from view for a time. All of the eyewitnesses agree that the fire originated at this point. Within a few minutes the fire was seen advancing over the knoll to the south, from whence it swept southward with increasing swiftness. The line of fire went between thirty and forty rods east of the house where defendants were camped. E. C. Nafus, a witness for plaintiff, came towards the fire from the east as soon as he saw the first smoke. He testified that the front, or head fire, was about twenty rods wide when it was one-half mile south from its place of starting, and that he went south from that point in front of the advancing flames a mile and a quarter for the purpose of back-firing to protect his property, and that he had fired but about three rods when the head fire reached him. This was at 12:30 p. m., as near as he could fix the time. At this point the head fire, which was here but a few rods wide, was stopped by a fire break and a weed patch. This witness followed the east side fire, and back-fired in that direction outside of his fire break, and in advance of the flames spreading eastward towards his premises. But little attention was paid by this witness to the side fire on the west, but he testified that the fire passed west of his fire break, and went south about a mile and a half. This carried the line of fire one-half mile south of the property which was destroyed, and one-half mile east of it. This witness says: "At three o'clock I was about three-fourths of a mile from Shoemaker's buildings. I could see his house. There was fire west of that, but I could not see how far. It was burned as far west as I could see." The fire on the west side burned westward all along the line from Kilby Lake to its terminus in the south, a distance of more than three miles. John W. Goodman, another of plaintiff's witnesses, and one who was nearest the west side of the fire, testified that it was "side-firing and back-firing all the way along,—all the way along the full length of the first head fire." Another witness, E. C. Stinchcomb, was a mile west of the fire line. He testified to the stopping of the head fire at 12:30 p. m. at the point indicated by the witness Nafus, and says: "The side fire was still burning as far as I could see at that time in a westerly direction. The head fire was entirely stopped at that point. All the fire left was the side fire burning west." The defendants and one of the Wisner brothers were at the Kilby house, engaged in protecting themselves, their property, and the house from the fire which was advancing towards them from the north and from the east. What they did will be considered later. We have stated sufficient facts to give an intelligent understanding of the questions presented on the motion for a new trial, and before us upon this appeal.

At the close of the case the defendants moved the court to instruct

the jury to return a verdict in their favor on the grounds ("1) that the undisputed evidence in this case shows that the main fire which originated on October 6, 1897, in a northerly direction from what has been known in this case as the 'Kilby House,' where the defendants were encamped, was not, and could not have been, set by the defendants, or either of them; (2) that the undisputed evidence in the case shows that no fire set by the defendants, or under their direction, or with their knowledge or consent, for the purpose of protecting their own property or otherwise, was allowed to spread beyond their control, or through their neglect to pass from under their control, or that any such fire in any way contributed to, or resulted in, the destruction or injury to the plaintiff's property, or any portion thereof." This motion was denied, and an exception taken to the ruling. Thereupon the defendants presented a separate request for a direction that they could not be held liable for the origin of the main fire. This was refused at the time, and an exception taken, and the case was argued to the jury upon both issues. At the close of the argument, however, with the consent of plaintiff's counsel, the court instructed the jury that the defendants could not be held responsible for the starting of the main fire northeast of the Kilby house. Counsel for appellants insist that the error in not granting his motion relative to defendants' responsibility for the main fire, at the time it was made, was not, and could not be, cured by granting it after the case had been argued to the jury upon that as one of the main issues, under the exceptional circumstances of this case. This presents an interesting question of practice, which we need not decide or discuss, inasmuch as we have reached the conclusion, after a careful study of the evidence, that the verdict returned cannot be sustained. By consent of counsel, all responsibility of the defendants for the origin of the main fire was eliminated, and is the law of this case. It is apparent, then, that, if the verdict can be sustained at all, there must be some evidence in the record tending to show that the defendants negligently started a new and independent fire, and that such fire either caused, or directly contributed, in a degree worthy of the law's notice, to the destruction of the property in question. Counsel for plaintiff contend that such is the case, and that the defendants were negligent in starting a certain back fire at the Kilby house, and allowing it to escape to the south. In this connection the evidence shows that the defendants, who were without previous experience in fighting prairie fires, placed themselves under the direction of their teamster, Wisner, for the purpose of protecting their camp from the approaching flames. An old fire break, partially surrounding the house, was freshened up with shovels. Back fires were set on the north, where the danger was greatest; also, on the west side of the house. These fires were entirely extinguished by means of water and wet sacks. The fire was also whipped out as it approached on the east side. On the south side a back fire was carried along to the west in advance of the main side fire. This was extinguished on

the side toward the house, but on the south side was permitted to run its course with the wind. It is contended that the acts of defendants in starting this fire on the south and permitting it to run were negligent, or at least that it was a question for the jury to say whether they were or not. An examination of the undisputed evidence upon this point leads us to a different conclusion. It is shown that at the time the back fire was set on the south side of the house the original fire had gone two or three miles to the south, and was burning westward all along the line. Under such conditions the defendants had a right to believe that this back fire, which they carried a few rods to the west in advance of the main fire, would join and burn out in the main fire, and that is just what did occur, as the evidence shows that the back fires united with the main fire within 50 rods of the house. All of the facts relative to the defendants' acts in starting the back fire are undisputed, and we are of the opinion that fair-minded men could not draw an inference from them that the defendants were negligent and imprudent in starting them in the manner and under the circumstances narrated. The question of negligence was not, then, for the jury. *Tomp. Trials*, § 1667. It is not negligence to start a back fire to protect one's property, providing the care and diligence of an honest and prudent man are exercised in guarding it. *Jespersen v. Phillips* (Minn.) 48 N. W. Rep. 770. In *McKenna v. Baessler* (Iowa,) 53 N. W. Rep. 103, 17 L. R. A. 310, it was held that one whose property had been destroyed by a back fire set by himself might recover from the person negligently setting out the fire from which he sought to protect himself, when it appeared that it would have been destroyed had the back fire not been set at all. The court said: "In determining this case, it is a most important fact to be kept in mind that the plaintiff's property would surely have been destroyed by the fire set out by the defendants, if plaintiff had remained idle. He would have been a mere spectator looking on at the destruction of his own property. It was not only his lawful right, but his duty, to use all reasonable and proper means to arrest the disaster. Every person is bound to use diligence to save himself from the negligent act of another. * * * When the plaintiff kindled the back fire, and thereby sought to save his buildings, he was in the strict line of duty, not only in attempting to save his property, but to save the defendants from an absolute liability for damages. It was his duty to fight the fire with fire or water, or in any way, so that his efforts in that direction were reasonable and proper." In the case at bar it must be conceded that the property of plaintiff's intestate would have been destroyed by the main fire, had no back fire been set by the defendants; and it also seems clear that the acts of defendants in protecting their property were reasonable and proper, within the meaning of the Iowa case from which we have quoted. So, also, we must conclude that the original fire, for which defendants are not responsible, was the direct, efficient, and proximate cause of the damage suffered by plaintiff's intestate.

The original fire was not only the responsible cause of the loss of the property involved, but it was the operative cause resulting in the back fires set by the defendants to protect their property and that under their charge, as well as various other back fires which were set out by other parties at other points on the same day to protect themselves against this same fire. In *Insurance Co. v. Boon*, 95 U. S. 117, 24 L. Ed. 395, the court said: "The question is not what cause was nearest in time or place to the catastrophe. That is not the meaning of the maxim, '*Causa proxima, non remota, spectatur.*' The proximate cause is the efficient cause,—the one that necessarily sets the other causes in operation. The causes that are merely incidental, or instruments of a superior or controlling agency, are not the proximate causes and the responsible ones, though they may be nearer in time to the result. It is only when the causes are independent of each other that the nearest is, of course, to be charged with the disaster. * * * The proximate cause, as we have seen, is the dominant cause, not the one which is incidental to that cause, its mere instrument, though the latter may be nearest in place and time to the loss." We think the case at bar comes within the principle of *Scott v. Shepherd*, 2 W. Bl. 892, 3 Wils. 403, which has been universally approved by both courts and text writers whenever referred to. We quote from Bish. Noncont. Law, § 45: "The defendant threw a squib into an open market house, where there were many people. It fell upon the standing of Yates, and another there, instantly to prevent injury to himself and Yates, threw it across the market house, and it fell upon the standing of Ryal, who instantly, for the same reason as before, sent it to another part of the market house, and it there took effect upon the plaintiff. The intermediate throwings, it is perceived, were from an impulse natural and to be expected, so that the disastrous result, though 'remote,' was deemed a product of the original cause. That the thrower of the squib was properly held liable to the person finally injured was never doubted, and the doctrine of this case is accepted as law in all our states." To what extent the back fire set by defendants accelerated the spread of the main fire to the property destroyed, if at all, is wholly conjectural, and, furthermore, is not an element tending to establish any liability, in view of our conclusion that the acts of the defendants in back-firing to protect their property in the manner already described were reasonable and proper precautions under the conditions which confronted them. Ordinarily, in an action to recover damages for negligence, the question of whether the acts complained of were negligent is for the jury. This is not true, however, where the evidence is undisputed, and it is apparent that fair-minded men would not infer negligence from the facts proved. The judgment of the District Court is reversed, and a new trial granted. All concur.

(81 N. W. Rep. 285.)

ARCHIBALD J. CRAIG, *et al* vs. ROSA HERZMAN, *et al*.

Opinion filed December 1, 1899.

Mortgage—Mechanic's Liens—Priorities.

The provision found in section 4795, Rev. Codes, giving a court authority, under conditions stated therein, to order real estate to be sold, and the proceeds to be divided between the mortgagee, who had the first lien upon the land, and a mechanic's lien holder, who had a first lien upon the building, does not impair the obligations of the mortgage existing upon said land before the building was erected, and before the law was passed.

Constitutional Requirement—Prospective Operation of Laws—Procedure.

Such provision, as it relates to procedure only, may be applied in any case tried after its enactment, although the cause of action arose before the enactment. The rule requiring statutes to be given prospective operation only does not apply to statutes relating to procedure.

Mechanic's Lien Not Destroyed by Repeal of Lien Law.

The repeal of the mechanic's lien law, as it existed in the Compiled Laws, by the enactment of the Revised Codes, did not operate to extinguish liens that had been acquired under the prior law. Where a mechanic's lien has attached under the law in force at that time, the holder's right thereto becomes vested, and cannot be destroyed by the repeal of the law.

Appeal from District Court, Cass County; *Pollock, J.*

Action by Archibald J. Craig and others against Rosa Herzman and others. Judgment for plaintiffs. Defendants appeal.

Affirmed.

Mills, Resser & Mills, for appellants.

Appellants' mortgage was given and recorded prior to the passage of § 4795, Rev. Codes, allowing a sale of the entire property and an apportionment of the proceeds. A sale of the entire property where the mechanic's lien attaches to the building only, appellants' mortgage on the land being a first lien, would violate the constitutional restriction upon laws impairing the obligation of contracts. Secs. 10 and 16, article I, Const. U. S.; *Bronson v. Kinzie*, 1 How. 311; *Taylor v. Stearns*, 18 Grat. 288. Wherever a subsequent law affects to diminish the duty or impair the right it necessarily bears on the obligation of the contract in favor of one party to the injury of the other, and is obnoxious to the prohibition of the constitution. *Grantley's Lessees v. Ewing*, 3 How. 707; *Planters' Bank v. Sharp*, 6 How. 301; *Curren v. State*, 15 How. 319; *Howard v. Bugbee*, 24 How. 461; *Hawthorn v. Cliff*, 2 Wall. 10. One of the tests that a contract has been impaired is that its value has by legislation been diminished. *Edwards v. Kearzey*, 96 U. S. 595-601; *Rutland v. Copes*, 15 Richardson (S. C.) 105; *Boice v. Boice*, 27 Minn. 371; *O'Brien v. Kreuz*, 36 Minn. 136. It is no answer that

the legislation in question is a regulation of the remedy and not of the right to the land. Where an act so changes the nature and extent of existing remedies as to impair the rights and interests of the owner it is just as much a violation of the contract as if it directly overturned his rights. *Greene v. Biddle*, 8 Wheat. 1; *Robards v. Brown*, 40 Ark. 423; *Collins v. Collins*, 79 Ky. 88; *Phinney v. Phinney*, 81 Me. 450. Statutes must be so construed as to give prospective and not a retroactive effect, particularly so where a retrospective construction will interfere with a vested right. *Sutherland on St. Cr.* § 206; 23 Am. & Eng. Enc. L. 448; *Cutting v. Taylor*, 51 N. W. Rep. 949; *Am. Ins. Co. v. County*, 59 N. W. Rep. 212; *Conrad v. Smith*, 6 N. D. 337; *U. S. v. Heath*, 3 Cranch. 399; *Harvey v. Taylor*, 2 Wall. 328; *Smith v. Auditor*, 20 Mich. 398. This is true of mechanics' liens. *Boisot on Mechanics' Liens*, § 41; *McCarthy v. Havis*, 3 South. Rep. 819; *Cooley, Const. Lim.* 370; *Phillips on Mech. Liens*, 22; *Vanderpool v. Ry. Co.*, 44 Wis. 652; *Plum v. Sawyer*, 21 Conn. 351. The liens in question were filed under chapter 31, Comp. Laws 1887, all parts of which applicable to this case were repealed by the Revised Codes of 1895, and without any saving clause. The repeal of the statute destroyed the rights of the lien claimants. 23 Am. & Eng. Enc. L. 502; *Lamb v. Schattler*, 54 Cal. 319; *County v. Kincaid*, 71 Ill. 587; *Chapin v. Crusen*, 31 Wis. 209; *State v. Campbell*, 44 Wis. 209; *State v. Van Stralen*, 45 Wis. 437; *Purmort v. Tucker*, 2 Col. 470. The lien of a mechanic does not arise out of his contract but depends upon the statute alone for its existence. *Bailey v. Mason*, 4 Minn. 430; *Boisot*, § 33. It is within the power of the legislature therefore to do away with the lien entirely. *Watson v. Ry. Co.*, 47 N. Y. 157-162; *Frost v. Ilsley*, 54 Me. 345.

Newton & Smith, and *Benton, Lovell & Bradley*, for respondents.

After the liens in question had been earned and asserted (filed) they became vested rights and it was beyond the power of the legislature to destroy them. There may be ownership of rights granted by statute. § 3267, Rev. Codes; § 2676 Comp. Laws. A thing of which there can be ownership is called property. § 3266, Rev. Codes. Mechanics' liens are assignable. *Phil. Mec. Liens*, § 55 and 29; Sec. 4797, Rev. Codes; *Const.* § 13; *Cooley's Const. Lim.* 429; *Wade, Retroactive Laws*, 156. Mechanics' liens by § 5469 were given to secure payment. The law in force at the time and place of making a contract enters into and forms a part of it, this embraces alike those which affect its validity, construction, discharge and enforcement. *Walker v. Whitehead*, 16 Wall. 314. There is a vested right in property which one owns and it cannot be taken away. *Suth. St. Cr.* § 480, p. 627; *Lane v. Nelson*, 79 Pa. St. 407; *Greenough v. Greenough*, 11 Pa. St. 489; *Weaver v. Sells*, 10 Kan. 609; *Smith v. Ry. Co.* 62 Miss. 510. The liens cannot be destroyed by repeal of the law under which they were filed. *Suth. St. Cr.* 628; *Waters v. Dixie, etc. Co.* 32 S. E.

Rep. 636. Notwithstanding the special repeal, by the Revised Codes, of the mechanics' lien laws theretofore existing, the liens filed under the Compiled Laws were not thereby destroyed. Where a statute is repealed and the repealing statute goes into effect the moment the former is repealed, and contains provisions identical with those in the repealed statute, such provisions are regarded as continuing in force without interruption. *Gull River Lumber Co. v. Lee*, 7 N. D. 135, 73 N. W. Rep. 430; *Steamship Co. v. Joliffe*, 2 Wall. 450; *Wright v. Oakley*, 5 Metc. 406; *Skyrne v. Mill Co.* 7 Nev. 219; *Sheftels v. Tobert*, 46 Wis. 439; *Fullerton v. Spring*, 3 Wis. 667; *Hurley v. Town*, 2 Wis. 634; *Lande v. Ry. Co.* 33 Wis. 640; *Glantz v. State*, 38 Wis. 549. This court in 1898 enforced a mechanic's lien filed under the Compiled Laws. *Turner v. St. John*, 8 N. D. 245, 78 N. W. Rep. 340. The legislature has plenary power as regards the remedy. *Pomeroy's Notes Sedg. St. Contr.* 617. The Revised Codes relate only to the remedy. Where a statute deals with procedure only, *prima facie*, it applies to all actions, those which have accrued or are pending and future actions. *Chaffee v. Aaron*, 62 Miss. 29; *Ry. Co. v. Company*, 35 Ohio St. 1; *Sampeynese v. U. S.* 7 Pet. 222; § 5148 Rev. Codes. It forms no objection to a law that the cause of action existed antecedent to its passage so far as it applies to the remedy and does not effect the right. *Dobbins v. Bank*, 112 Ill. 553; *Pco. v. Tebbets*, 4 Conn. 384; *Pco. v. Supervisors*, 63 Barb. 83; *Hanschall v. Schmidz*, 50 Mo. 458; *Blair v. Casey*, 4 Wis. 543; *Jacquis v. Clark*, 9 Cush. 279; *Com. v. Bradley*, 16 Gray, 241; *McNamara v. Ry Co.* 12 Minn. 388; *Wimberly v. Maybury*, 14 L. R. A. 305; *Bill v. Myreck*, 3 Dak. 294; *Thomas v. Smith*, 42 Pa. 68; *Hine v. Pomeroy*, 39 Vt. 211; *Hepburn v. Curtis*, 32 Am. Dec. 760; *McLimans v. Lancaster*, 73 Wis. 596, 23 N. W. Rep. 689. The rights of parties are not divested by changing the form of the property from real estate to money. *Norris v. Clymer*, 2 Pa. St. 277; *Sargeant v. Culen*, 2 Pa. St. 393; *Wade, Ret. Laws*, 241; *Wimberly v. Maybury*, 14 L. R. A. 305.

BATHOLOMEW, C. J. This is a contest between certain mechanic's lien holders and a purchaser under a mortgage foreclosure sale. The property consists of a certain lot in the City of Fargo, upon which a two-story brick building, with party walls on either side, has been erected. The mortgage was given long before the building or any part thereof was placed upon the lot. The mechanic's liens attached before the foreclosure of the mortgage. This action was brought by the lienholders. The Red River National Bank was the only defendant that appeared and answered. It claimed title under the foreclosure proceedings, free and clear from all the mechanics' liens. The trial court established the liens upon the building, and found the value of the lot without the building and the value of the building separately, and each at the same sum, and directed that the premises be sold, and that one-half of the proceeds of sale be paid over to the defendant bank; that the mechanics'

liens, as established, and in their order, be paid from the other half; and that the surplus, if any, be paid over to the bank. From this decree the bank appeals.

The first position of appellant, as we understand it, is briefly this: When the mortgage under which it derives title was given, and when it was foreclosed, and when appellant received its deed thereunder, the statute in force relative to mechanics' liens declared that, where a building was erected upon land upon which there was an existing mortgage, the mortgage should remain a first lien upon the land, but that the liens for labor and materials used in the construction of the building should be a first lien upon the building, and that the building might be sold under said liens, and removed from the land. Comp. Laws, § 5480. It concedes that it possesses only such rights as came to it through the mortgage, and that it took such rights subject to the mechanics' liens, so far as they existed and could be enforced under the law existing when the mortgage was given, and when appellant acquired its title, but to no other or greater extent. It claims that the provision under which the court ordered a sale of the entire property was passed after it acquired its rights, and, in effect, impaired the obligations of the mortgage contract, and hence, as to appellant, such provision is unconstitutional and void. The provision is found in section 4795, Rev. Codes, which went into effect January 1, 1896, and is as follows: "But if in the opinion of the court it would be for the best interests of all the parties that the land and the improvements thereon should be sold together, it shall so order and the court shall take an account and ascertain the separate values of the land and of the erection, buildings or other improvements, and distribute the proceeds of sale so as to secure to the prior mortgage or other lien, priority upon the land, and to the mechanic's lien priority upon the building, erection or other improvement." It will be noticed that under the prior law the priority of the mechanic's lien was enforced by a sale and removal of the building. It so happens in this case that the building is so situated that it can be removed only by demolition. This a court will not sanction, where it would impair the rights of the former mortgagee. *Lumber Co. v. Danner*, 3 N. D. 475, 57 N. W. 343. Hence, if appellant's contention that its contract rights are impaired be correct, it will follow that the mechanics' liens can never be enforced against the property, and the appellant will enjoy the rare good fortune of having the value of its property doubled without any expense to itself.

It is admitted that the statute of which complaint is made is primarily remedial in character, but it is insisted that, if it enforce a remedy in a manner that prejudices contract rights, the facts that it is remedial does not take it out of the operation of the constitutional inhibition. It must be conceded that such is the law. *Taylor v. Stearns*, 18 Grat. 288; *Bank v. Schranck*, 97 Wis. 250, 73 N. W. Rep. 31, 39 L. R. A. 569; *Barnitz v. Beverly*, 16 Sup. Ct. 1042, 41 L. Ed. 93; *Edwards v. Kearzey*, 96 U. S. 600, 24 L. Ed.

793; *Antoni v. Greenhow*, 107 U. S. 769, 2 Sup. Ct. 91, 27 L. Ed. 468. It is necessary, then, to determine whether this statute did prejudicially affect contract rights existing by virtue of the mortgage. The impairment prohibited by the constitution is not a mere imaginary or impossible injury. The law must render the contract obligation less valuable, either by a contraction of its scope or increasing its duties, or by rendering it invalid or less enforceable. If such be the necessary effect of the law, it matters not how slight the impairment. *Green v. Biddle*, 8 Wheat. 1, 5 L. Ed. 547. What were the rights of the mortgagee under the mortgage? Primarily, to have the property covered by the mortgage—which was the naked lot—applied to the satisfaction of the debt secured by the mortgage. True, as to the mortgagor, the rights under the mortgage have ripened into title, his right of redemption has been foreclosed. But as to these lienholders whose rights in the building under the former law were superior to the rights of the mortgagee, and which rights could not be affected by the foreclosure, the appellant must still rely solely upon its rights under the mortgage. Under the amended statute, and under the decree of the trial court, the lot is still devoted exclusively to the payment of the mortgage debt. The contract obligation is not impaired in that respect. But appellant says that, if a mechanic's lien may be enforced by compelling a sale of the entire property, it might force a mortgagee to change the term of his investment, and put him to the trouble and expense of seeking another investment, and perhaps with a lower rate of interest. Should we admit this to be a valid objection to the statute,—and we do not,—still the answer would be that this appellant cannot raise that objection. Here, on the record, the mortgage was long since due. Appellant cannot possibly suffer in the manner indicated. "Only those whose rights would be prejudiced by the enforcement of an unconstitutional act can be heard to question its validity." 6 Am. & Eng. Enc. L. 1090, and cases cited. Again, it is urged that the law forces the mortgagee's security to a forced sale at the instance of the mechanic's lien holder, possibly on a bad market, and compels him to take such proportionate share in the proceeds as will give him priority on the land. This is only an imaginary possibility. The statute does not necessitate a sale upon a bad market. The law cannot presume anything of the kind. Moreover, the objection ignores the express wording of the statute. It says: "But if in the opinion of the court it would be for the best interests of all parties," etc. The interests of the mortgagee are as carefully fostered as those of the mechanic's lien holder. In this case we are bound to presume that the court found it to be for the best interest of appellant that the sale should be so ordered, and that is conclusively presumed to be correct, as it is not brought before us for review. We are clear that there is no impairment of contract here involved, of which appellant can complain.

Another position urged by appellant is that the statute, as found

in the Revised Codes, is prospective only, and cannot be given a retrospective operation, and hence cannot apply to the liens here involved, or to rights accruing under the mortgage. The general rule requiring statutes to be given only a prospective operation unless a different legislative intent is manifest is well settled. But the rule is not generally applied to statutes relating to procedure. In Suth. St. Const. § 482, it is said: "Where a new statute deals with procedure only, *prima facie* it applies to all actions,—those which have accrued or are pending, and future actions. If, before final decision, a new law as to procedure is enacted and goes into effect, it must from that time govern and regulate the proceedings. But the steps already taken, the status of the case as to the court in which it was commenced, the pleadings put in, and all things done under the late law, will stand, unless an intention to the contrary is plainly manifested; and pending cases are not affected by general words as to future proceedings from the point reached when the new law intervened. A remedy may be provided for existing rights, and new remedies added to or substituted for those which exist. Every case must, to considerable extent, depend on its own circumstances. General words in remedial statutes may be applied to past transactions and pending cases, according to all indications of legislative intent: and this may be greatly influenced by considerations of convenience, reasonableness, and justice." The numerous cases cited by the author abundantly support the text. The new statute, in so far as it authorizes the court to order a sale of the entire property, and divide the proceeds in a manner to properly secure the rights of the respective parties, related to procedure only, and must be given a retrospective operation.

As its last contention, appellant urges that all the mechanics' liens here asserted arose and were claimed under the lien law as it existed in the Compiled Laws, and that such law was expressly repealed by the Revised Codes, without any saving clause, and that consequently the liens given by that law perished with it. We do not think this result followed. We had occasion to discuss this point to some extent in *Lumber Co. v. Lee*, 7 N. D. 135, 73 N. W. Rep. 430. The authorities are not unanimous. We cited them to some extent on page 137, 7 N. D., and page 431, 73 N. W. Rep., but did not decide the point, as it was not necessary in that case. We were there discussing a purely statutory lien,—a lien on personal property for taxes, and in which no element of consideration or contract could enter. Where, under a contract such as the law prescribes, one party furnishes to another things of value, for which the law gives the party so furnishing a lien, such party, upon compliance with the statute, has a vested right in such lien. It is the security, the mortgage, which the law furnishes him, and upon which he relied in parting with his valuables. It is property in his hands, and cannot be divested by a repeal of the law under

which he obtained it. In *Weaver v. Sells*, 10 Kan. 609, it is said: "When ever a mechanic's lien is created for material furnished, the right to the lien becomes a vested right at the time the material is so furnished; and it is not within the power of the legislature to afterwards destroy such right by repealing the statute under which the right has accrued, or otherwise." In *Hoffman v. Walton*, 36 Mo. 615, it is said: "The lien when filed, operates as an incumbence." In *Wade*, Retro. Laws, § 173, after stating the general principle that vested rights could not be destroyed by legislative action, the author adds: "The rights of contractors, material men, sub-contractors, and laborers, under statutes giving mechanic's liens, and rendering them enforceable against the property upon which the work is done or materials furnished, are similar in kind, and governed by the same principles. The lien secured by giving notice, and otherwise complying with the law, or even the right to the lien before notice given, is part of the obligation of the contract, and at the same time is a right which the law secures to the mechanic or material man, under the same sanctions as may be invoked to protect the title to corporeal property." In *Waters v. Manufacturing Co.* (Ga.) 32 S. E. Rep. 636, it is said: "When the lien of a material man has, under the terms of the statute, become fixed and secured, such lien is then a vested right, and no subsequent repeal or modification of the act under which it became fixed can destroy or modify such right." See, also, *Händel v. Elliott*, 60 Tex. 145; *Streubel v. Railroad Co.*, 12 Wis. 67; *Chowning v. Barnett*, 30 Ark. 560; *Hallahan v. Herbert*, 11 Abb. Prac. (N. S.) 326; *In re Hope Min. Co.*, 12 Fed. Cas. 487 (No. 6,681); *Steamship Co. v. Jolliffe*, 2 Wall. 450, 17 L. Ed. 805; *Skyrme v. Mining Co.*, 8 Nev. 219; *Buser v. Shepard*, 107 Ind. 417, 8 N. E. Rep. 280. We think the great weight of authority supports the holding of the foregoing cases. They certainly commend themselves to us as both logical and equitable. For a collection of the authorities holding that mechanics' lien laws pertain only to the remedy, and that liens are changed or swept away with the law, see Boisot, Mech. Liens, § 33, and cases cited. Finding no error in the judgment roll, the decree of the District Court is in all things affirmed. All concur.

(81 N. W. Rep. 288.)

STATE OF NORTH DAKOTA vs. JOHN PEOPLES.

Opinion filed April 19, 1900.

Bastardy—Evidence.

Action under the statute regulating bastardy proceedings. Evidence examined, and *held*, that the verdict was justified by the evidence.

Verdict Not Against Law.

Held, further, that under the facts and evidence, as stated in the opinion, the verdict is not against law, or against the instructions of the court as given to the jury.

Appeal from District Court, Walsh County; *Sauter, J.*
John Peoples was convicted of crime, and appeals.
Affirmed.

Gray & McMurchie, for appellant.

Spencer & Sinkler, for the State.

WALLIN, J. This action is brought under the statute regulating bastardy proceedings. The complaining witness was never married, but was delivered of a bastard child, born alive, on the 16th day of May, 1898, which child was living at the time of the trial. She charges the defendant with the paternity of the child, and alleges that she had sexual intercourse with defendant at the township of Prairie Center, in Walsh county, on or about August 15, 1897. The defendant's answer consists of a general denial of the allegations of the complaint. The verdict declared, in effect, that the defendant was the father of the child in question.

At the close of the testimony, defendant moved for a directed verdict in his favor. This motion was denied, and the ruling is assigned as error in this court. No exception was taken to the instructions given to the jury, but defendant claims that the verdict is not justified by the evidence, and that the same is contrary to law; *i. e.* against the instructions given by the trial court to the jury. In all prosecutions under this statute, the pivotal inquiry is whether or not the person accused is the father of a particular illegitimate child; and in this case the plaintiff had the burden of showing, as an ultimate fact, that the defendant is the father of the child of which the complaining witness was delivered on May 16, 1898. The evidence in the case was all admitted without objection, and we find in the record ample evidence sustaining the charge as made in the complaint. It appears that the complaining witness and defendant were employed by a cousin of the defendant, who was operating a large farm in Walsh county. Defendant was a farm hand on the farm, and the complaining witness was a domestic servant at the farm house situated on the farm. Such employment had continued for a period of over two years prior to August 15, 1897, and existed for some time subsequent to that date. The fact that sexual intercourse had occurred with more or less frequency between these parties prior to and subsequent to August 15, 1897, was fully testified to by the complaining witness. Nor did the defendant attempt to deny the general fact of sexual intercourse with the complaining witness. On the contrary, on his direct examination the defendant testified as follows: "I did not have sexual intercourse with her at all after the 10th of July and before the 10th of September. I did not have sexual intercourse between the 10th of July and the 10th of September." He further testified that he did not have such intercourse on the 5th of September, 1897. This certainly does not deny intercourse at any time. On his cross-examination the defendant squarely admitted that he had sexual

intercourse with the complaining witness on the 12th day of September, 1897. The complaining witness in her direct examination was explicit as to the intercourse, and as to the date of one act of intercourse with the defendant. She testified in chief as follows: "He had sexual intercourse with me on the 15th of August last (referring to 1897). It was at Henry Peoples' place. He had sexual intercourse with me more than once. I do not know how many times,—quite a number. I became pregnant as a result of having sexual intercourse with him." There was an infant in the court at the trial, and the complaining witness, pointing to the infant, said: "That is the baby. John Peoples is the father of that baby." After testifying that she had intercourse with defendant on August 15, 1897, she said on cross-examination that the only means she had of fixing the date was by counting back nine months from the time the child was born." She stated further that she had such intercourse with the defendant only once in August, 1897. She claimed further that this was on a Sunday. There was certain evidence offered by the defense, of a circumstantial nature, tending to show that the complaining witness had been guilty of sexual intercourse with another man employed on the farm, and that such intercourse took place about the 15th of August, 1897. The complaining witness testified positively that such sexual intercourse did not take place in August, 1897, and further testified directly and positively as follows: "I never had intercourse with any person besides Peoples." In her testimony the complaining witness said, in substance, referring to the act of intercourse in August, 1897: "For a year before that time I never had any intercourse with Peoples." This was said on cross-examination, but later in her cross-examination she corrected this statement as follows (referring to August 15, 1897): "I do not know whether I had intercourse for a full year before that. I do not know whether it was a long time before this date. It might have been a week or two. I stated to you before supper that it had been a year, but I didn't understand you,—didn't know what you meant." On redirect examination the witness testified: "I did not understand what Mr. McMurchie meant when he asked me some time ago if I had intercourse with this defendant for less time than a year before the middle of August. I do not know whether it was one, two, three, four, or five weeks before this time, or after the 15th of August, that I had intercourse with him. It might have been longer or shorter. I do not know." There was some evidence offered tending to show that the act of intercourse alleged in the complaint to have taken place August 15th in fact occurred, if it took place at all, on Sunday, the 5th day of September, 1897. This apparent conflict or discrepancy in the testimony was submitted, with all the other evidence and facts of the case, for the consideration of the jury, and the jury were instructed, in terms, that it was their province to weigh the evidence and determine the credibility of the witnesses. This court in this case, under the law, is required to presume that the jury fairly and

fully considered the evidence, and the whole of the evidence, submitted to them, and we have no hesitation in saying that the verdict rests upon a substantial basis of testimony, and hence we deem it unnecessary to further discuss the verdict, with reference to the evidence adduced at the trial.

But one other assigned error remains for consideration. Counsel contend that the verdict is against law, or, at least, against the law of this case, as laid down by the court in its instructions to the jury. The court said to the jury, in substance, in its charge, that it was a matter of common knowledge that the shortest period of gestation was about 260 days; and, applying this statement to the defendant's testimony, the court further instructed the jury as follows: "If you find that the defendant did not have sexual intercourse with the complaining witness between the 10th day of July and the 10th day of September, 1897, then you must find the defendant not guilty." This is a proper charge, under the evidence; and if there were no testimony in the case tending to show that sexual intercourse occurred between the 10th of July and the 10th of September, 1897, between the parties in question, the verdict would be squarely against the instructions of the court, and would have to be vacated for that reason. But it has been seen, in the evidence referred to, that there is evidence of intercourse in August, 1897; and, further, it may be added that the complaining witness testified positively that the defendant was the father of the child born on May 16, 1898, and that the complaining witness never at any time had sexual intercourse with any person other than the defendant. This testimony being before the jury, it was their duty to consider the same in connection with all the evidence in the case. Having declared by their verdict that the defendant was guilty, we are bound to presume that the jury found from the evidence that acts of sexual intercourse occurred between these parties between July 10 and September 10, 1897. If such acts occurred in August, either before or after August 15th, the verdict would not then be contrary to the law, or to any instruction of the trial court. Our conclusion is that the judgment of the trial court must be affirmed. All the judges concurring.

(82 N. W. Rep. 749.)

STATE OF NORTH DAKOTA vs. JOSEPH KING.

Opinion filed April 19, 1900.

Sodomy—Punishment.

The measure of punishment which may be legally imposed upon one convicted of attempting to commit the crime of sodomy is provided by subdivision 1 of section 7694, Rev. Codes. The above subdivision fixes the punishment of attempts to commit crimes which are punishable by four or more years' imprisonment in the penitentiary, or by imprisonment in the county jail, at not to exceed one-half of the longest term prescribed for the completed offense. *Held*, that

the petitioner, who was convicted of an attempt to commit the crime of sodomy, and sentenced to five years in the penitentiary, was legally sentenced; the crime of sodomy being punishable to the extent of ten years in the penitentiary.

Application of Joseph King for writ of habeas corpus.
Denied.

Cole & Johnson, for petitioner.

John F. Cowan, Attorney General, (*Edward Engerud*, of counsel),
for the State.

YOUNG, J. This is an application for a writ of habeas corpus. The petitioner was convicted in the District Court of Cass county at the February, 1899, term of an attempt to commit the crime of sodomy, and was sentenced to the state penitentiary for a period of five years. He urges, as ground for release from his confinement, an entire lack of legal authority, under the statute, to impose a penitentiary sentence for the crime of which he was convicted, or in fact to inflict any other than a jail sentence as a punishment therefor. This contention rests entirely upon the construction to be given to section 7694, Rev. Codes, relating to punishments for attempts, under which the petitioner was sentenced. The portions of this section which are important read as follows: "Every person who attempts to commit any crime, and in such attempt does any act toward the commission of such crime, but fails, or is prevented or intercepted in the perpetration thereof, is punishable, when no provision is made by law for the punishment of such attempt, as follows: (1) If the offense so attempted is punishable by imprisonment in the penitentiary for four years or more, or by imprisonment in the county jail, the person guilty of such attempt is punishable by imprisonment in the penitentiary or in a county jail, as the case may be, for a term not exceeding one-half the longest term of imprisonment prescribed upon a conviction for the offense so attempted. (2) If the offense so attempted is punishable by imprisonment in the penitentiary for any time less than four years, the person guilty of such attempt is punishable by imprisonment in the county jail for not more than one year." The punishment prescribed for the crime of sodomy is found in section 7186, Id., which provides that it "is punishable by imprisonment in the penitentiary not less than one and not exceeding ten years or in the county jail not more than one year." The measure of punishment for an attempt to commit this crime, it is agreed, is given by one of the two subdivisions of section 7694, *supra*. The petitioner was sentenced under the first subdivision, whereas he contends that the penalty for the attempt of which he was convicted is governed by the second subdivision, and is, therefore, limited to a jail sentence. This contention is based upon the assertion that sodomy is not punishable "for four years or more," which plainly is a prerequisite to punishment under the first subdivision, but that it is punishable "for any time less than four years," which, it is claimed, brings it under

the second subdivision, and limits his punishment to confinement in the county jail. The construction contended for by the petitioner, in our judgment, is not tenable, and does not conform to the intention of the legislature, and is not supported by the language of the sections relied upon. Obviously, it was intended to classify punishments for attempts with reference to the seriousness of the crime attempted. Accordingly, we find that, where the crimes attempted are punishable by confinement in the penitentiary for four years or more, or by confinement in the county jail, by a uniform provision, attempts to commit such crimes are punishable by imprisonment not to exceed one-half of the completed crime. On the other hand, attempts to commit crimes which are punishable by less than four years in the penitentiary were viewed with more lenity, and are not to be followed by confinement in the penitentiary at all, but are to be punished by jail sentences only. It is true, a discretion as to the extent of punishment to be imposed is lodged in the District Court. It may sentence one convicted of sodomy to confinement in the county jail, or impose a penitentiary sentence which may be less than four years, but these are discretionary matters, and do not alter the fact that as a crime it is by statute punishable—i. e. may be punished—by imprisonment in the penitentiary for a period not exceeding 10 years. The inquiry as to how a crime is punishable relates to the period or extent of punishment which can legally be imposed, and not, as we view it, to any lesser or discretionary period, which may be determined by the court in imposing sentence. The crime of sodomy is punishable—that is, it may be punished—by imprisonment in the penitentiary for not less than one nor more than ten years. It is, then, clearly, in this view, punishable by imprisonment for four years or more, even up to ten years, and is not a crime punishable by less than four years. The attempt, therefore, of which the petitioner was convicted was punishable under the first subdivision of section 7694, *supra*. It follows, then, that the petitioner was legally sentenced. Our construction is in harmony with that given to the California statute, which is almost identical in language with section 7694, *supra*. See *Ex parte Hope*, 59 Cal. 423.

The petition is denied. All concur.

(82 N. W. Rep. 423.)

NORTHWOOD TRUST AND SAFETY BANK v. AUGUST MAG-
NUSSON, *et al.*

Opinion filed April 19, 1900.

Replevin—Complaint—Allegation of Value—Verdict—New Trial.

In an action to recover the possession of personal property, the complaint, without referring to items, stated that the total value of the property described in the complaint was \$1,500. The answer denied such value, and alleged that the total value of the property was \$2,000. The sheriff seized and turned over to plaintiff a portion

only of the property described in the complaint, and in his return described the property so seized by items, and with particularity. The verdict was for defendants, and fixed the value of the property seized by the sheriff, and described in his return, at \$2,090. There was no evidence offered of the value of the property seized. A motion for a new trial was made upon the ground, among others, that the verdict as to the value of the property was not justified by the evidence. Pending this motion, by leave of court, defendant filed a remittitur of the excess of the verdict above \$1,500, and claimed that plaintiff was bound by the averments in his complaint as to the value of the property in controversy. The motion for a new trial was granted. *Held*, that the order granting a new trial was proper. The allegations and admissions in the pleadings were made with reference to the lump value of certain property described in the complaint, and these could not be resorted to in fixing the value of a different mass of property, viz: that seized by the sheriff.

Appeal from District Court, Grand Forks County; *Fisk, J.*

Action by the Northwood Trust & Safety Bank against August Magnusson and Sven Magnusson. Verdict for defendants. From an order granting a new trial, they appeal.

Affirmed.

B. G. Skulason, for appellants.

Bosard & Bosard, for respondent.

WALLIN, J. This is an action brought to recover the possession of certain personal property, consisting of horses, colts, cows, calves, grain, farming implements, etc., all of which are particularly described in the complaint, and also described in the affidavit delivered with claim and delivery papers in the action to the sheriff for service. The plaintiff alleges in its complaint that said property (*i. e.* that described in the complaint and affidavit) is of the gross value of \$1,500, and further alleges title and ownership as a basis for its alleged right of possession. The complaint also avers that the defendants unlawfully detained the property from the plaintiff. The answer denies the plaintiff's allegation of ownership, and sets up title in the defendants, and further sets up a claim of damages in the sum of \$500 for the alleged unlawful taking and detention of the property by the plaintiff. The answer denies, further, that the property described in the complaint is of the value of \$1,500, and alleges its true value to be \$2,000. The verdict was as follows: "We, the jury in the above-entitled action, find that the defendants are the owners and entitled to the possession of the personal property described in the sheriff's return; and we further find that the value of the said personal property is the sum of (\$2,090.00) two thousand ninety dollars, with interest." The verdict further awarded the defendants \$300 as damages suffered on account of the taking and detention of said property by the plaintiff.

Among other evidence adduced at the trial was the return of the sheriff in the claim and delivery proceeding. That part of such return which is now material is as follows: "After search and inquiry, the other articles of property mentioned in said affidavit

could not be found." A comparison of the return with the affidavit reveals the fact that a portion of the property described in said affidavit, as well as in the complaint, was not seized or taken out of the defendants' possession or turned over to the plaintiff by the sheriff. It is manifest that the jury, after finding that defendants were the owners and entitled to possession of certain property, viz: the property taken by the sheriff out of the defendants' possession by the claim and delivery proceedings in this action, proceeded to fix the value of such property, and no other property. Their verdict so declares in unmistakable terms, and the verdict is conclusive upon the question as to what particular property was valued by the jury. This is made doubly certain by reference to the instructions given to the jury by the trial court, as follows: "At the time the papers were served the sheriff of this county, under and by virtue of claim and delivery proceedings, took from the possession of the defendants certain of the property described in the complaint, and the same, not having been rebonded by the defendants, was turned over to the plaintiff bank; and it is this property alone with which you are to deal, a description of which will be submitted to you with the exhibits in the case."

Upon a settled statement of the case a motion for a new trial was made in plaintiff's behalf upon numerous specifications of error, but we shall have occasion to mention but one, viz: that the verdict was not justified by the evidence, particularly in this: that there was no evidence in the case that the property was worth \$2,090, and no evidence of any value whatsoever. Pending the motion, and before the same was finally submitted, the defendants' counsel, by leave of the trial court, filed a remittitur, whereby the defendants remitted from the verdict the sum of \$590, leaving a verdict for the sum of \$1,500 and interest as and for the value of the property, to which was added \$300 as defendants' damages for the detention. After hearing counsel and considering the remittitur, the trial court granted the motion for a new trial, and in its order granting the motion the court uses the following language: "The above order is made wholly on the ground that the evidence as to the value of the property in controversy is insufficient to justify the verdict." Counsel for defendants contend that, inasmuch as the value of the property described in the complaint is alleged in the complaint to be \$1,500, plaintiff is estopped from denying that value, and that, defendants having remitted from the verdict the excess above the alleged value, no evidence of value is requisite to a valid verdict upon the matter of value. But the reasoning of counsel embodies a manifest fallacy. It overlooks the decisive fact that the jury could not lawfully, and did not in fact, attempt to place any value upon the property which the complaint averred was of the total value of \$1,500. The jury placed a value upon a portion only of the property described in the complaint, viz: that portion which the sheriff seized and described in his return, and turned over to the plaintiff. The property actually seized had never been mentioned

or valued in the complaint; nor did the answer, in responding to the allegations of the complaint, have reference to the value of the property subsequently seized by the sheriff, and later valued by the jury, as appears by the terms of their verdict. In order to recover a judgment for the value, the defendants had the burden to show, first, what particular property had been unlawfully seized and taken from the defendants' possession; and, second, establish the value of such property by competent evidence. As we have seen, the value could not, under the circumstances of this case, be established by any admissions or allegations contained in the pleadings. We think that the fact that the defendants deemed it expedient to remit from the verdict all in excess of \$1,500 and interest, as representing the value of the property in controversy, operates as an admission that no evidence was introduced tending to fix a value upon the property described in the sheriff's return. However this may be, we are prepared to hold, after a careful consideration of the entire record, that the trial court did not err in holding that the verdict is without support in the evidence upon the point of value. We cannot discover a scintilla of evidence in this record which bears upon the question of the value of the specific property seized by the sheriff and described in his return, at the time of its seizure. The order appealed from will be affirmed. All the judges concurring. (82 N. W. Rep. 748.)

AUGUST MAGNUSSON vs. M. V. LINWELL.

Opinion filed April 20, 1900.

New Trial—Sufficiency of Evidence.

Testimony examined, and *held*, that the verdict rests upon substantial evidence, and hence that the trial court properly overruled a motion for a new trial, based solely upon the ground of the insufficiency of the evidence to justify the verdict.

Review.

Held, further, that the record does not warrant this court in holding that the trial court considered that the evidence preponderated against the verdict returned by the jury.

Duty of Court Where Evidence Preponderates Against the Verdict.

Accordingly, *held*, that the question is not presented or decided in this case whether, in a case of a substantial conflict in the testimony, it would be the duty of the District Court to grant a new trial in a case where that court is of the opinion that the evidence preponderates against the verdict, and is intrinsically unjust.

Appeal from District Court, Grand Forks County; *Fisk, J.*
Action by August Magnusson against M. V. Linwell. Judgment for plaintiff, and defendant appeals.
Affirmed.

Bosard & Bosard for appellant.

When an appellate court conscientiously and irresistibly reaches the conclusion that the verdict is against truth and the undoubted weight of evidence, and could only have been reached through passion or prejudice or a failure to exercise a sound and unbiased judgment on the part of the jury, such court should unhesitatingly reverse the ruling of the trial court refusing to vacate such verdict. *Fuller v. N. P. Ry. Co.*, 2 N. D. 220, 50 N. W. Rep. 359; *Reynolds v. Lambert*, 69 Ill. 495; *Branson v. Carothers*, 49 Cal. 374; *Sullivan v. Cloud Co.*, 47 Pac. Rep. 165.

B. G. Skulason, for respondent.

The rule is well established that a verdict upon conflicting evidence will not be disturbed on appeal. *Moline Plow Co. v. Gilbert*, 3 Dak. 239, 15 N. W. Rep. 1; *Finney v. N. P. Ry. Co.*, 3 Dak. 270, 16 N. W. Rep. 500; *Edwards v. Fargo & S. W. Ry. Co.*, 4 Dak. 549, 33 N. W. Rep. 100; *Pielke v. C. M. & St. P. Ry. Co.*, 5 Dak. 444, 41 N. W. Rep. 669; *Taylor v. Jones*, 3 N. D. 235, 55 N. W. Rep. 593; *Black v. Walker*, 7 N. D. 414, 75 N. W. Rep. 787; *Bishop v. C. M. & St. P. Ry. Co.*, 4 Dak. 536, 62 N. W. Rep. 605; *Becker v. Duncan*, 8 N. D. 600, 80 N. W. Rep. 762; *Erickson v. Sophy*, 10 S. D. 71, 71 N. W. Rep. 758; *Meyer v. Davenport Elev. Co.*, 80 N. W. Rep. 189.

WALLIN, J. The plaintiff is seeking by this action to recover damages caused, as plaintiff alleges, by an assault and battery committed by the defendant upon the person of the plaintiff on February 14, 1898. The litigation in the District Court resulted in a verdict for the plaintiff in the sum of \$200, for which sum judgment was entered, with costs. Defendant has appealed to this court from such judgment.

An application for a new trial was made to the trial court, and in disposing of the motion that court used the following language: "It is ordered that said motion be, and the same is hereby, denied. The only ground urged in the motion why a new trial should be granted is the alleged insufficiency of the evidence to justify the verdict of the jury. The record discloses that the plaintiff testified positively to the assault, and there is some evidence tending to corroborate his testimony; while the defendant and his witnesses testified to facts tending to show that no assault was committed. There being a substantial conflict in the testimony, I cannot, as a matter of law, see that the verdict of the jury was against the weight of evidence, especially in view of the fact that two of the defendant's witnesses were associated with him in the banking business, and would be apt to color their testimony in his favor. At least, these were matters proper for the jury to consider in determining the weight to be given to their testimony. I therefore deny the motion, without expressing any opinion as to whether or not said verdict was in accordance with a preponderance of the testimony. Twelve men having found in favor of the plaintiff, and there being a substantial conflict in the testimony, and there being sufficient

testimony upon which to base such verdict, I decline to interfere with the action of the jury." We deem the comments of the trial judge upon the evidence in the record to be specially pertinent to a decision of the case in this court, and hence have quoted his observations at length. It will be unnecessary to set out the evidence, inasmuch as we fully agree with the trial judge in concluding that the record shows that the verdict rests upon substantial evidence. The plaintiff testified expressly that an assault and battery was committed upon his person by the defendant, and that the same resulted in bodily injuries of a painful, and perhaps lasting nature. We agree with the trial court also that some testimony was introduced tending to corroborate the evidence of the plaintiff, and this both as to the fact of the assault and battery and as to the injuries resulting therefrom. True it is that the defendant testified that what he did was justifiable, and was not an assault in contemplation of law, but was, on the contrary, only the exercise of lawful force used in turning the defendant out of the plaintiff's bank after the plaintiff unlawfully refused to go out. The version of the affair, as testified to by the defendant, was corroborated by the evidence of certain other witnesses in defendant's behalf; but, as was remarked by the trial court, the jury had a right, in weighing the testimony, to consider the fact that the defendant's witnesses were associated in business with the defendant, and to determine whether such association would tend to color their testimony. Counsel for the defendant, while conceding that the testimony is squarely conflicting upon the principal question of fact in the case, nevertheless strenuously urges that it was, despite such conflict, the duty of the trial judge to grant a new trial upon the sole ground that the evidence preponderates in favor of the defendant. In support of this, counsel cites an array of authority, among which are the following: *Hawkins v. Reichert*, 28 Cal. 539; *Dickey v. Davis*, 39 Cal. 569; *Mason v. Austin*, 46 Cal. 387. These cases hold, in effect, that, where a motion for a new trial is based upon the insufficiency of the evidence, such motion is addressed to the sound discretion of the trial court, and that where the trial court is satisfied that the verdict is against the weight of the evidence that court should vacate the verdict, and grant a new trial, despite the fact that there may be a conflict in the testimony. These cases also hold that the same discretion is not lodged in the court of review for the reason that such court, unlike the trial court, does not possess the advantage of seeing the witnesses, and observing their demeanor on the stand. But these cases are all predicated upon the assumption that the evidence, in the opinion of the trial court, preponderates against the verdict. Unless the court which saw and heard the witnesses is of that opinion, the cases have no application. This being so, the cases cited would not be applicable in this case, if we should adopt the rule laid down in the cases cited,—and this court has not hitherto adopted it,—unless the trial court was of the opinion that the evidence preponderates against the verdict. We are not prepared to

hold that such was the view of the trial court in the face of the language of the court that he denies the motion "without expressing any opinion as to whether or not said verdict was in accordance with a fair preponderance of the testimony." Moreover, we are inclined to say that, despite the language last quoted, it is apparent from the tenor of the language used, construed as a whole, that the learned trial court is not prepared to hold that the testimony preponderates against the verdict. We are certainly prepared to say that this court, under the settled law of this state, would not be justified, in opposition to the views of the court below, in vacating a verdict in a case where the evidence, though conflicting, is of a substantial character, and such as would, if believed by the jury, warrant them in returning the verdict which was found. See *Taylor v. Jones*, 3 N. D. 235, 55 N. W. Rep. 593; *Black v. Walker*, 7 N. D. 414, 75 N. W. Rep. 787; *Erickson v. Sophy*, 10 S. D. 71, 71 N. W. Rep. 758; *Meyer v. Elevator Co.* (S. D.) 80 N. W. Rep. 189. Under the circumstances and facts disclosed by the record, we deem it to be our duty to affirm the order denying the new trial. All the judges concurring.
(82 N. W. Rep. 746.)

AUGUST MAGNUSSON, *et al* vs. M. V. LINWELL, *et al*.

Opinion filed April 24, 1900.

Specific Performance—Evidence.

This action was brought to compel specific performance of a contract to sell land, whereby defendants, upon certain conditions, agreed to sell to plaintiffs the land described in the complaint. Upon a trial anew in this court, and upon consideration of the evidence and facts in the record, it appears that long prior to the commencement of this action the plaintiffs had transferred, each acting separately and at different dates, all their right, title, and interest arising under the contract of purchase and sale to these defendants; that such transfers were made knowingly and willingly, without fraud, and upon adequate consideration. Accordingly, *held*, that the plaintiffs are without equity, and having no standing in court upon which a claim of specific performance can be predicated.

Appeal from District Court, Grand Forks County; *Fisk, J.*

Suit by August Magnusson and Sven Magnusson against M. V. Linwell and Charles Gustafson. Judgment for defendants, and plaintiffs appeal.

Affirmed.

B. G. Skulason, for appellants.

H. N. Morphy and *Bosard & Bosard*, for respondents.

WALLIN, J. This action is brought to obtain a specific performance of a written contract made between the parties to this action, dated October 28, 1892, whereby the defendants, in consideration of an agreed purchase price of \$2,700, payable in five annual in-

installments, drawing interest at 10 per cent., agreed to sell, and upon full payment to convey, to the plaintiffs, in *fee simple*, a certain quarter section of land described in the complaint. Plaintiffs allege that they have demanded a deed of the land, and that they "have fully and faithfully performed on their part all the conditions precedent imposed on them by the terms of the contract of sale," and further allege that, if the court shall find that they have not fully paid for the land, they are ready and willing to pay any balance which may be found unpaid. By their answer defendants admit that they entered into the contract as stated in the complaint, and admit that at divers times plaintiffs have paid upon the purchase price of the lands certain sums, amounting in the aggregate to \$1,740.29, and allege that said payments have all been credited upon the installment notes given for said purchase price of the land, and defendants deny that said price has been paid in full, and allege that there is still \$2,208.65 which has never been paid. Defendants further allege, in substance, that said plaintiff (Sven Magnusson) has no interest whatever in said land, or in the result of this action, for the reason that on or about the 8th day of February, 1895, he (the said Sven Magnusson) assigned and transferred to the plaintiff August Magnusson all his right, title, and interest in or to the land; and defendants further aver that the plaintiff August Magnusson has no interest whatever in the land in question, for the reason that the said August Magnusson, on the 23rd day of December, 1897, did, in consideration of the cancellation of an unpaid balance of \$2,208.65 then due on the purchase price of said land, and for other valuable considerations, quitclaim all his interest under said contract, and in said land, to said defendants, and did then and there, and upon such consideration, release and cancel said contract, and released defendants from all liability arising from or on account of such contract. Defendants ask that said contract be adjudged canceled, and that the defendants be released and absolved from all liability under said contract, and for their costs and disbursements. The case was tried in the District Court without a jury, and a judgment was entered in favor of the defendants for all the relief asked for in their answer. Plaintiffs appeal from such judgment, and have demanded a trial anew in this court of the entire case.

It will be convenient, in disposing of the case in this court, to set out a portion of the findings made and filed by the trial court as a foundation for the judgment entered in that court: "(1) On the 28th day of October, 1892, and for some time prior thereto, the defendants, M. V. Linwell and Charles Gustafson, were seized and possessed of the land in suit. (2) On the 28th day of October, 1892, the defendants contracted to sell the said lands to the plaintiffs, which contract was evidenced by a written instrument, marked Exhibit 1, as follows: (Here the written contract is set out in the findings at length, but, as the substance of the contract has already been stated in general terms, we deem it unnecessary to

copy it in full for the purposes of this opinion. (3) Upon the execution and delivery of the said instrument, the plaintiffs entered into the actual possession of the lands in controversy. (4) On or about the 8th day of February, A. D. 1895, the plaintiff Sven Magnusson assigned and transferred all his interest in said contract (Exhibit 1) to August Magnusson by an instrument in writing (Exhibit 13), as follows: (Here follows Exhibit 13, but as the same is of considerable length, and, moreover, is quite inaccurate in its description of the contract of sale in question, we deem it unnecessary, under the circumstances of this case, to set it out at length. The instrument was, however, found by the trial court to have been executed, *i. e.* signed and sealed, by Sven Magnusson, the plaintiff, in the presence of two subscribing witnesses, on the 28th day of February, 1895; and, as has been seen, the trial court finds as a fact that Sven Magnusson intended, in executing this instrument, to transfer all of his interest under the sale contract in question to his brother, August Magnusson.) (5) On the 7th day of December, 1893, the plaintiffs paid to the defendants upon the said contract (Exhibit 1) the sum of \$785. (6) The plaintiff August Magnusson paid on account of the said contract, on the 1st day of December, 1895, the sum of \$495.39, and on the 4th day of December, 1896, the sum of \$459.40. (7) On the 23d day of December, 1897, the plaintiff August Magnusson and the defendants had a complete settlement of the matters involved in the said contract (Exhibit 1), and the several payments thereon, and there was found to be due from the said plaintiff to the said defendants on the said date the sum of \$2,208, balance of the purchase price of the said land. (8) On the 23d day of December, 1897, by an instrument in writing indorsed upon the duplicate of the contract (Exhibit 1), the plaintiff August Magnusson quitclaimed and surrendered the said land described in the said Exhibit 1 to the defendants herein, and the consideration for the said transfer was the said balance due to the defendants for the said land under and by virtue of the terms of the said contract (Exhibit 1). (9) That the defendants thereupon entered into the possession of the said land, and are still seized and possessed of the same." Upon said findings, the court found, in substance, as a legal conclusion, that the defendants were entitled to judgment as prayed for in their answer.

There are other allegations of fact in the complaint as to which considerable testimony was offered at the trial, and concerning which counsel have contended more or less in this court in their briefs and oral arguments, but we shall not have occasion to further allude to such other allegations and matters of fact in this opinion; for the reason that, in the view taken of the entire case by this court, as presented by the record, the facts found by the trial court, as above set out, are decisive of the result in this court, if such facts are supported by the evidence, and, in our judgment, the facts found below are supported by a decided preponderance of the evidence in this record.

The judgment, as entered, is based upon two controlling facts, viz: First, that the plaintiff Sven Magnusson, on February 28, 1895, transferred all of his interest in the sale contract and in the land in question to his co-tenant in the land, *i. e.* to August Magnusson; second, that more than two years subsequent to such transfer, and on December 23, 1897, said plaintiff August Magnusson, by an instrument in writing properly authenticated and indorsed upon the sale contract, transferred and quitclaimed all of his interest under the land contract, and the land described therein, to the defendants in this action.

It is needless to say that if these transfers were actually and voluntarily made by the plaintiffs, respectively, and were not made under a mistake of fact, and were not fraudulently obtained, the plaintiffs have no standing in court upon which they can ask for a decree of a court of equity for a specific performance of the contract in question. Even if the land had been fully paid for, the plaintiffs, after an assignment of all their interest to the defendants, would not be in a position to demand a deed of the land from the defendants, or to ask title at the hands of a court. We have carefully read and considered the evidence, and have weighed the arguments of counsel bearing upon the bona fides and legality of the two transfers, and we are convinced by such evidence that such transfers were intentionally made, and made with a deliberate purpose on plaintiffs' part of disposing of all their rights and interest derived through or under the contract in suit. It is unnecessary, in our judgment, to array all the evidence bearing upon this question. Without enumerating further details, the evidence shows to our satisfaction that no payments were made upon the purchase contract by either of the plaintiffs after the year 1896, and that on December 23d of the year 1897 there was a balance due on the contract of \$2,208, which balance we are justified in saying, upon this record, has never been paid, in whole or in part. True, the plaintiffs' counsel contend that other moneys paid to liquidate other debts of the plaintiffs should be applied as payments upon the land contract, but it is our judgment that the evidence does not sustain this contention, but does sustain the finding of the trial court as to the amount still unpaid upon the purchase money.

August Magnusson admits that he signed the instrument of transfer, whereby he purported to quitclaim all of his interest under the land contract to these defendants on December 23, 1897. True, he claims that he did not understand the purport and effect of the instrument of transfer which he signed, but, in our opinion, this contention is overborne by the evidence of several witnesses who were present, and who testify that the quitclaim was signed deliverately by August after its nature and contents were clearly made known to him in his own language. Nor is the claim made that any special inducements were offered or any fraudulent representations made by the defendants to induce August Magnusson to quitclaim to the defendants. The contention seems to be that the quitclaim was signed, so to speak, automatically, and in blind obedi-

ence to the request or command of the defendants so to do. The clear weight of the evidence, however, bears out the defendant's version of the transaction, which is to the effect that the quitclaim was signed voluntarily upon the consideration, among other things, of a release and cancellation of the notes given for the purchase money, \$2,208 of which, as we have seen, was then due. Plaintiffs' counsel contends that a special relation of trust and confidence resulted from the relation of the parties to the action, because the plaintiffs were not good business men, and could not read, write, or speak the English language, and because the defendants were business men of experience, and as such were in a position to exert a strong and controlling influence upon the minds of the plaintiffs, and that plaintiffs in fact trusted defendants implicitly in the details of all their business transactions with defendants. We are unable to see that this contention is substantiated by the record. There is no evidence that plaintiffs were men below the average in mental capacity, or that they did not depend upon their own judgment and views of business policy in their transactions with defendants. Nor are we able to see from the evidence that the defendants have violated any legal or moral obligations in their dealings with the plaintiffs. The plaintiffs, as well as the defendants, were in duty bound to protect their own interests, and we think, in dealing with the defendants, they were at arm's length, and, under the law, were bound to accept the consequence of their dealings with the defendants, despite the fact that the business venture involved in the purchase of the land on credit, and at a high rate of interest, turned out disastrously to them. We have considered carefully all the evidence in the record bearing upon the finding of the court below upon the matter of the alleged transfer made February 28, 1895, of all the interest in the land contract by Sven Magnusson to his brother August. We are of the opinion that the evidence fully sustains the finding that such transfer was made. At and prior to such transfer, Sven was dangerously ill, or considered so by his brother August, and under these circumstances August sought the defendants, and asked their advice as to the proper course to pursue with reference to Sven's property, which then included, besides the land in question, certain personal property owned jointly by the brothers, and situated upon the land. Their advice being asked in the premises, the defendants advised that Sven should transfer to August all of his property, and, at the request of August, the defendants drew two separate instruments of transfer,—one to transfer the goods and chattels, and one to transfer the interest of Sven in the land to August. The instrument relating to the land was, however, defectively framed, and was very inaccurate in the matter of a description of the contract in question. But this was the result of inadvertence, and not of design. The two instruments were taken away by August, and subsequently he returned them both to the defendants, and there-

after they were left in defendants' possession. When returned, both instruments appeared to have been executed by Sven. Subsequently, as appears by a preponderance of the evidence, Sven talked with the defendants concerning the matter of transferring his interests in his said property by the instruments in question to his brother, and expressed himself as fully satisfied with the transfer, saying, in substance, to defendants, that he was very glad and more than satisfied to be out of the deal, and much more of the same general purport. Nor did Sven at any time after February 28, 1895, and prior to December 23, 1897, the date of said transfer by August to the defendants, ever say or intimate to the defendants that he regretted the transfer to August; nor did he at any time prior to or at the time of the settlement between August and the defendants ever demand a return to him of any papers in the hands of the defendants, or in any manner, to defendants' knowledge, attempt to assert a right, as against his brother, to any of the property embraced in the instruments of transfer.

Counsel contend that the alleged transfers of property, real and personal, from Sven to August, never were made in law or in fact. They claim that the evidence shows that said instruments of transfer were never signed at all by Sven, and that both were in fact signed by August, and that August affixed the name of Sven Magnusson to the instruments at a time when Sven was in a state of semi-consciousness, and that, so far as Sven knew what was being done at the time, he supposed that his name was being signed to his last will and testament, and that all parties present, including August and the witnesses subscribing, were of that opinion also. There is much conflict in the testimony as to whether Sven did or did not knowingly sign the instruments of transfer, and whether, even if he did, he was conscious at the time; but we deem the matter to be unimportant, in view of the subsequent attitude which the evidence shows was assumed by Sven Magnusson, for a period of over two years, with reference to such alleged transfers. The evidence leaves no room for doubt that Sven well knew that the instruments of transfer had been made in his behalf, and delivered to the defendants, and that defendants were acting in good faith, upon the assumption that the instruments of transfer evidenced a bona fide transfer of the property by himself to August Magnusson. It is certain, too, that August, in December, 1897, by formal instruments of transfer, assigned what purported to be a transfer of all his property referred to. The evidence of such transfer is in writing, and there is no pretense that either the defendants or August Magnusson mentioned the name of Sven pending the negotiations for the transfer of the property to defendants, or that either side to the transaction ever suggested at that time that the assent or signature of Sven was necessary to transfer the property to the defendants. For the best of reasons, both parties to the transfer made in December, 1897, ignored the existence of Sven Magnusson. His own repeated assertions, independent of any other

written transfers very naturally led his brother and these defendants to believe that he had ceased to have any interest in, or title to, the land in question. Under such circumstances, Sven Magnusson has no standing in a court of equity to deny the bona fides of his transfer to his brother. Nor does it lie in his power to point out defects in the instrument of transfer. He well knew that defendants relied upon the validity of the instruments in their hands, and, by word of mouth, in effect acquiesced in their validity. He is therefore in no position to ask a court of equity to undo what he has deliberately done and long adhered to. Our conclusion is that neither of these plaintiffs is entitled in equity to a decree in his favor. The judgment of the court below must be affirmed, with costs of both courts. All the judges concurring.

(82 N. W. Rep. 743.)

STATE VS. ROBERT ROSENCRANS.

Opinion filed April 21, 1900.

Larceny—Possession of Stolen Property.

The recent personal possession of stolen property, not satisfactorily explained, constitutes an evidential fact, from which complicity in the larceny thereof may be inferred.

Evidence Sufficient to Sustain Conviction.

Accordingly held, that evidence of the possession of the stolen property, which consisted of a mower and two hayrakes, by the defendant, within 10 days after it was stolen, and at his home 16 miles from the place where stolen, is, in connection with the other evidence in the case, sufficient to uphold the verdict of the jury finding him guilty of the larceny.

Failure to Instruct in Absence of Request.

Failure to instruct the jury on a particular phase of the evidence cannot be urged as prejudicial error, in the absence of a request so to do.

Witness Acting as Bailiff.

The fact that a sheriff and deputy sheriff are sworn as witnesses in a criminal case does not, of itself, operate to disqualify them from acting as bailiffs in charge of the jury during their deliberations.

Appeal from District Court, McHenry County; *Morgan, J.*

Robert Rosencrans was convicted of larceny, and appeals.

Affirmed.

W. J. Anderson, for appellant.

John F. Cowan, Attorney General, and *A. J. Ames*, State's Attorney, for the State.

YOUNG, J. The defendant was convicted of the crime of grand larceny at the October, 1899, term of the District Court of McHenry county. A motion for a new trial was made in his behalf, and

overruled, and defendant sentenced to imprisonment in the penitentiary for two years and six months.

Four assignments of error are subjoined to counsel's brief as grounds for reversing the judgment of the District Court and its order refusing a new trial. These will be considered in the order assigned in the brief.

First, it is urged that the verdict is clearly against the evidence, in this: that "there was no evidence to show the defendant was connected with the theft or aided in it." We may say here that the information upon which the defendant was tried and convicted charges him with the larceny of a mower and two hayrakes, all alleged to have been the property of one P. O. Kongslie, and of the value of \$105, and that said larceny was committed on the 30th day of July 1899. It is conceded that the property described was the property of Kongslie, that it was stolen, and that it was of the value as alleged. The defendant's sole contention is that there is no evidence to connect him with the larceny. A careful examination of the evidence upon this point leads us to a different conclusion. It appears, without dispute, that the property in question was taken from the premises of the owner about August 5, 1899. It is undisputed, also, that on August 14th thereafter a portion of the property, at least, was found near the premises of the defendant, some 16 miles distant from the place where it was stolen. Kongslie, the owner, testified that he visited the premises of the defendant on the last-named date, in company with the sheriff, who had a search warrant, and that he saw all of his property there,—the two rakes in defendant's yards near his house, and the mower in a hay meadow about two and a half miles away. Both the sheriff and Kongslie testified that when they came in sight of the mower the defendant had his team hitched to it and was using it. There is evidence, also, that the defendant unhitched from it as soon as he saw them approaching, and when the sheriff met him, and asked him whose mower it was, he said he did not know. It also appears that one of the rakes which Kongslie claims to have seen in the defendant's yard, and identified as his, has not been recovered, while the other one was found by the sheriff later, submerged in a small lake about a half mile from the defendant's house, the wheels having been taken off. These facts, and others of an incriminating nature, were before the jury, in connection with the defendant's explanation of his connection with the stolen property, and were, we think, sufficient to authorize the jury to conclude that the defendant was guilty of the larceny of the property. It is a well-settled principle that the recent personal possession of stolen property, not satisfactorily explained, is an evidential fact, from which complicity in the larceny of the property may be inferred. See Whart. Cr. Ev. § 758. As we have seen, there was evidence both of recent and personal possession of the stolen property in the defendant, and it was for the jury to say whether his explanations removed or increased the inference of guilt deducible from such possession.

Appellant's second ground relates to the failure of the court to give to the jury a specific charge upon a certain phase of the evidence which he deemed important. No further reference to this need be made than to say that no request for such an instruction was made by defendant's counsel. This court has held that mere failure to instruct, when not requested to do so, is not prejudicial error. *State v. Haynes*, 7 N. D. 352. For further discussion, see *Thomp. Tr.* §§ 2338-2341.

The next assignment of error is that "the court erred in swearing in Robert Gorman and James Pendroy as bailiffs to have charge of the jury, and turning the jury over to them during its deliberations, they having given testimony in the case against the defendant." This assignment cannot be sustained. It was the duty of the trial judge, under sections 8211, 8218, Rev. Codes, to place the jury in the charge of sworn bailiffs during their retirement and deliberations. In performance of that duty the persons named were sworn in. One was sheriff and the other a deputy sheriff of McHenry county. No interest in the case is shown in either of them, and we are cited to no statutory provision or decision of any court which will support counsel's proposition that the mere fact that a sheriff or deputy has testified in a case renders him incompetent to act as bailiff and take charge of the jury. Furthermore, the act complained of occurred during the trial, and was not objected to by the defendant, and cannot, therefore, be now urged as error.

Counsel's last assignment is "that the court erred in not granting a new trial to let in newly-discovered evidence." This, as we understand the record, has been abandoned by the appellant; for it is not urged here, and was not urged in the lower court. No reference is made to it in counsel's brief filed here, which purports to embody his entire argument presented to the trial court upon the motion for new trial. Finding no error in the record, the judgment is affirmed. All concur.

(82 N. W. Rep. 422.)

STATE vs. HARRY SMITH YOUNG.

Opinion filed April 23, 1900.

Arson—Information.

An information under the statutes of this state which accuses the defendant of the crime of arson, and charges facts constituting arson in the third degree as defined by the statute, is sufficiently specific as to the crime charged, and does not accuse of one crime and state facts constituting a different crime.

Instructions—Circumstantial Evidence.

In a criminal case, where the evidence was entirely circumstantial, the giving of the following instruction, to-wit: "The law requires the jury to be satisfied of the defendant's guilt beyond a reasonable doubt, but, in order to warrant a conviction, does not require that you should be satisfied beyond a reasonable doubt of each link in the chain of

circumstances relied upon to establish the defendant's guilt. It is sufficient if, taking the testimony all together as a whole, you are satisfied beyond a reasonable doubt of the guilt of the defendant,"—*held error.*

Error Not Cured by Proper Instruction.

This error was not cured by reason of the fact that the court, in other portions of the instructions, correctly stated the doctrine of reasonable doubt.

Appeal from District Court, Dickey County; *Lauder, J.*
Harry Smith Young was convicted of arson, and appeals.
Reversed.

George W. Parks and *E. P. Perry*, for appellant.

The prosecution can never in a criminal case properly claim a conviction upon evidence which expressly or by implication shows but a part of the *res gestae* or whole transaction, if it appear that the evidence of the rest of the transaction is attainable. *Hurd v. Peo.*, 25 Mich. 405; *Weller v. Peo.*, 30 Mich. 612; *Peo. v. Wolcott*, 51 Mich. 23. If the facts are consistent with innocence they are not proof of guilt. *Ormsby v. Peo.*, 53 N. Y. 137; *Frazier v. Peo.*, 54 Barb. 309; *Peo. v. Stokes*, 2 N. Y. Cr. Rep. 382; *Com. v. Holmes*, 127 Mass. 424. Conduct being susceptible of two opposite explanations we are bound to assume it to be moral, rather than immoral. *Port v. Port*, 70 Ill. 484; *Mason v. State*, 32 Ark. 239; *Greenwood v. Lowe*, 7 La. Ann. 197. The following instruction was erroneous: "The law requires the jury to be satisfied of the defendant's guilt beyond a reasonable doubt, but in order to warrant a conviction does not require that you should be satisfied beyond a reasonable doubt of each link in the chain of circumstances relied upon to establish the defendant's guilt. It is sufficient, if taking them altogether as a whole, you are satisfied beyond a reasonable doubt of the guilt of the defendant." *Hoffman v. State*, 73 N. W. Rep. 51; 1 Stark. Ev. 502; *State v. Cohen*, 78 N. W. Rep. 857; *State v. Furney*, 21 Pac. Rep. 216; *Marion v. State*, 20 N. W. Rep. 294; *Graves v. Peo.*, 32 Pac. Rep. 66; *Leonard v. Ter.*, 8 Pac. Rep. 878; *Clair v. Peo.*, 10 Pac. Rep. 799; *Com. v. Webster*, 5 Cush. 295; *Peo. v. Phipps*, 39 Cal. 333; *Crow v. State*, 26 S. W. Rep. 209; *Peo. v. Aiken*, 33 N. W. Rep. 821; *Kallock v. State*, 60 N. W. Rep. 817; 3 Rice, Ev. 347; *Clare v. Peo.*, 9 Colo. 123; *Peo. v. Aiken*, 66 Mich. 481. The verdict of the jury was a nullity, the information does not charge arson in the third degree. *In re McVey*, 70 N. W. Rep. 51.

E. E. Cassels, State's Attorney, for the State.

At common law the defendant was not permitted to give testimony in his own behalf, hence the prosecution was required to swear all witnesses of the occurrence. The common law disability being removed, the reason for the rule is gone. *State v. McGahey*, 3 N. D. 293. The instruction challenged finds support in the

cases. 2 Thomp. Tr. 1868, § 2514; Sackett, Inst. 647; *Bressler v. Peo.*, 117 Ill. 422, 3 N. E. Rep. 522; *Hauser v. State*, 58 Ga. 78; *Jewell v. State*, 58 Ind. 293; *State v. Hayden*, 45 Ia. 11. Where there is some direct evidence of the defendant's guilt, the court is not in duty bound to charge the jury on the law concerning circumstantial evidence. *Solander v. Peo.*, 2 Colo. 48; *Barnard v. State*, 12 S. W. Rep. 431; *Hayes v. State*, 17 S. W. Rep. 940; *Woodruff v. State*, 12 South. Rep. 653; 2 Thomp. Tr. § 2514. An instruction to the effect that it is not necessary in order to convict that every fact should be proven beyond a reasonable doubt if on the whole of the facts there is no reasonable doubt of guilt is proper. *Weaver v. Peo.*, 24 N. E. Rep. 571; *Stebert v. Peo.*, 32 N. E. Rep. 421; *Jameson v. Peo.*, 34 N. E. Rep. 486; *Carlton v. Peo.*, 37 N. E. Rep. 244. The doctrine of reasonable doubt as a rule is not properly applicable to the whole mass of circumstantial evidence taken item by item, but is properly applicable to the constituted elements of the crime charged. *Wade v. State*, 71 Ind. 535; *Davidson v. State*, 34 N. E. Rep. 971; *Gallagher v. State*, 12 S. W. Rep. 1087.

BARTHOLOMEW, C. J. The defendant was informed against, tried, convicted, and sentenced for the crime of arson. A motion for a new trial was denied, and an appeal taken from the judgment. The first attack is made upon the information. The crime is designated in the information as arson. The charging part of the information sets forth facts constituting arson in the third degree as defined by our statute, and the court instructed the jury that the accused stood charged with arson in the third degree. The attack, which was made both by motion and demurrer in the court below, proceeds upon the theory that the offense is not specified in the information, and that arson and arson in the third degree are two distinct offenses. As our statute requires the offense charged to be specified and certain, it is urged that the pleader cannot name the offense, and then state facts constituting an entirely different offense. But we think this information cannot be so construed. Section 7382, Rev. Codes, defines arson as follows: "Arson is the willful and malicious burning of a building with intent to destroy it." The definition is very broad. Following on down to sections 7393 to 7400, inclusive, we find arson divided into four degrees, with a different punishment for each; but each degree comes clearly within the general definition of arson. They are only different degrees of the same crime, differing from different degrees of the same crime in other offenses in this: that the lower degree is not necessarily or generally included in the higher. By reason of this difference it must be true that under a charge of arson alleging facts showing arson in the first degree (the burning of a dwelling house) it would not be competent to prove the burning of a building constituting a lower degree of arson (for instance, a flouring mill, as in this case). The variance would be fatal. But, since each degree constitutes arson, the accused can be in no manner

misled or prejudiced by an information that charges arson, followed by an allegation of facts constituting arson in any of the specified degrees. No other facts could be proven, and no conviction could be had for any other degree. The only case cited by appellant that tends to support his position is *State v. Atkinson*, 88 Wis. 1, 58 N. W. Rep. 1034, and that case cannot be considered an authority here, both because the point involved was different, and because of the radical difference in the statutes of the two states. In Wisconsin no burning is specifically designated as arson. The burning of a dwelling house in the night time is punished by specific punishment. The burning of the same in the day time is punished by a lighter punishment. Other sections cover the burning of other named buildings in the night time or day time. Then follows another section, which the court designates as a "catchall" to cover all cases not previously covered, which prescribes a punishment for burning any building at any time. Under an indictment under the last section it was sought to convict of burning a dwelling house. The Supreme Court refused to sustain the conviction, on the ground that the two offenses were distinct and separate, and not different degrees of the same offense. But our statute in terms declares different degrees of the offense of arson. The degrees are distinct, and no conviction of one degree could ordinarily be had under an allegation of facts constituting another degree. The same result would be reached here as in Wisconsin, but here any degree is properly designated as arson. McClain, Cr. Law, § 525, and cases cited in notes. We hold the information sufficient, but a new trial must be ordered by reason of an error in the instructions. Many errors are assigned in giving and refusing instructions. Aside from the one hereafter discussed, these assignments should all be overruled, as the charge fully covered the law of the case, was clear, and as favorable to the defendant as the rules of law would justify. The court instructed the jury as follows: "The law requires the jury to be satisfied of the defendant's guilt beyond a reasonable doubt, but, in order to warrant a conviction, does not require that you should be satisfied beyond a reasonable doubt of each link of the chain of circumstances relied upon to establish the defendant's guilt. It is sufficient if, taking the testimony all together as a whole, you are satisfied beyond a reasonable doubt of the guilt of the defendant." This instruction was taken almost verbatim from Sack. Instruct. Juries, 647. It has been given in several cases, and has been the subject of considerable discussion, and we believe it is now universally condemned. It was given in *Bressler v. People*, (Ill. Sup.) 3 N. E. Rep. 521, and the language was expressly approved on page 528. An examination of the cases there cited to support the ruling will disclose the fact that they all fall far short of the position. The case was evidently reconsidered, because it is again reported in 8 N. E. Rep. 62, and the instruction is there held to be inaccurate, but harmless in that particular case, because there was no evidence in the case to which it could be applied. The case

seems to have been reported but once in the official reports. It appears in 117 Ill. 422, and shows that the opinion was twice filed with an interval of some months. As there reported, it corresponds with the report in 8 N. E. Rep. 62, so that the official reports of that state give no support whatever to the instructions. The same instruction was given in *Clare v. People*, 9 Colo. 122, 10 Pac. Rep. 799, and was expressly disapproved; and again in *Graves v. People*, 18 Colo. 170, 32 Pac. Rep. 63. In this case the authorities are extensively and critically reviewed, and it is shown that the instruction stands without support of any adjudicated case, and it is strongly condemned upon principle. The same instruction was given and expressly disapproved in *Marion v. State*, 16 Neb. 349, 20 N. W. Rep. 289; *Leonard v. Territory*, 2 Wash. T. 381, 7 Pac. Rep. 872; *State v. Gleim* (Mont.) 41 Pac. Rep. 998, 31 L. R. A. 294; *State v. Furney*, 41 Kan. 115, 21 Pac. 213; *State v. Cohen* (Iowa) 78 N. W. Rep. 857. The vice of the instruction is manifest. Where a conviction is sought upon circumstantial evidence, and the circumstances are interdependent, and the relevancy and probative force of each circumstance depend upon the truth of one or more other circumstances, so that the metaphor of a chain can with any propriety be used, then it is clear that each circumstance must be established beyond reasonable doubt, because, if any one link or circumstance be lacking, the evidence ceases to be a chain, and is simply fragments of a chain. If any one circumstance or link be weak, the whole chain must be weak, because a chain cannot be stronger than the weakest link. The instruction in such a case could not be otherwise than prejudicial. If the circumstances relied upon by the prosecution are independent, each depending for its force upon its own truth, and only that, then the chain metaphor is entirely inapplicable, and its only effect must be to confuse and mislead a jury. Doubtless a conviction may be had upon circumstantial evidence of that character, and, where the prosecution relies upon a number of such circumstances, it may fail to establish one or more beyond a reasonable doubt, and yet from those that are thus established the jury may entertain no reasonable doubt of the defendant's guilt. In such a case it might not be improper to instruct the jury that the state need not establish each independent circumstance beyond a reasonable doubt, if, from a consideration of the entire evidence, the jury entertained no reasonable doubt of the defendant's guilt. In the case before us the evidence was entirely circumstantial, and included circumstances that arraigned themselves linkwise as well as independent circumstances. The jury were left free to apply the instruction to either class. Nor can we say that the fact that the court in other parts of the instructions very clearly and correctly stated the doctrine of reasonable doubt cured the error in the instruction quoted. As said in *Clare v. People*, supra. "Where the charge in a criminal case contains in one part an important, correct, legal proposition, and in another an incorrect and conflicting proposition upon the same subject, the subject referred to being

material to conviction, it cannot be said that the error is avoided; for it is impossible to know upon which proposition the jury depended." It follows that there must be a new trial in this case.

Reversed. All concur.

(82 N. W. Rep. 420.)

JOHN C. OSWALD, *et al.* vs. PATRICK MORAN, *et al.*

Opinion filed April 26, 1900.

Note of Issue—Notice of Trial.

To entitle a party to a civil action in the District Court, wherein issue has been joined, to bring such issue to trial at a term of court, it is necessary that prior to such term he shall furnish the clerk of the court a note of the issue to be tried, and also to serve the adverse party with a notice of trial, as required by section 5422, Rev. Codes; and it is also necessary that the note of issue so furnished shall state what the issue is,—whether one of law, or one of fact.

Issue of Fact—How Set Down for Trial.

Where a case has been regularly upon the trial calendar at previous terms upon an issue of law raised by a demurrer, and such issue has been disposed of by final order, the clerk of the District Court is without authority to place the case upon the trial calendar of a subsequent term upon an issue of fact subsequently joined, unless a new note of issue is filed. Neither is a party entitled to force such fact issue to trial without serving a new notice of trial.

Case Must Be Renoticed on Remand from Supreme Court.

Where a civil case is properly upon the trial calendar of the District Court, and notice of trial has been properly served, and thereafter an appeal is taken to this court, accompanied by an undertaking staying all proceedings in the District Court pending the appeal, and the case is remanded to the District Court for trial, a new notice of trial is necessary.

Motion to Strike Case from Calendar.

It is accordingly *held*, that it was error in this case to deny a motion to strike the case from the trial calendar when it appeared that the issue of law raised by the demurrer had been finally disposed of at a prior term of court, and that subsequent to the joinder of issue of fact no note of issue had been filed with the clerk, or notice of trial served upon the adverse party, and upon the further ground that no notice of trial was served subsequent to the determination of the appeal by this court.

Judgment Irregular When Case Not Properly Noticed for Trial.

Held, further, that the judgment rendered and entered after the denial of such motion was irregularly rendered, and should be vacated and set aside.

Appeal from District Court, Stutsman County; *Glaspell, J.*

Action by John C. Oswald and Theodore Basting against Patrick Moran and others. Judgment for plaintiffs, and defendants appeal. Reversed.

Conklin & Murphy and *S. E. Ellsworth*, for appellants.

Notice of trial must be served after the issue to be tried has been formed by service of the proper pleadings. The note of issue must specify whether the issue presented is of law or of fact, that the order of its trial may be arranged. The note of issue must contain the date of service of the last pleading in order that the place of the case upon the calendar may be determined. § 5422, Rev. Codes. Applying the foregoing principles to the question hereby presented, and the case was improperly on the calendar of the July, 1899, term and should have been stricken therefrom on appellants' motion. *Romaine v. Bowdoin*, 42 N. Y. Supp. 67. The provision that a cause shall remain on the calendar from term to term until finally disposed of is intended to apply to causes pending and which the court may try, and not to causes removed by appeal to the Supreme Court pursuant to a statute which stays proceedings pending appeal. *Mead v. Billings*, 45 N. W. Rep. 228. Every change of issue arising from amendment or otherwise requires a new notice of trial and note of issue. *Ostrander v. Conkey*, 20 Hun. 421; *McBride v. Langan*, 11 N. Y. Supp. 626; *Graham v. Stirling Ins. Co.*, 13 N. Y. Supp. 562; *Grindal v. DeLano*, 15 N. Y. Supp. 823; *Gair v. Birmingham*, 15 N. Y. Supp. 147; *Fisher v. Gunn*, 34 N. Y. Supp. 27; *Yates v. McAdam*, 42 N. Y. Supp. 109; *Coler v. Lamb*, 46 N. Y. Supp. 117; *Wright v. Birmingham*, 47 N. Y. Supp. 954; *Hoskin v. Murray*, 51 N. Y. Supp. 542; *Kielly v. Traynor*, 55 N. Y. Supp. 744.

Oscar J. Seiler and Roderick Rose, for respondent.

The only object of notice of trial is to give the party on whom it is served a chance to prepare for trial. *Smith v. N. P. Ry Co.*, 3 N. D. 17, 53 N. W. Rep. 173. The note of issue is not provided for the benefit of the defendant but for the convenience of the court. 14 Enc. Pl. & Pr. 1063. On August 16, 1898, the court made an order concerning the appeal from the order overruling demurrer and providing among other things that pending said appeal the rights of all the parties should be preserved in the same condition as existed at the date of the order. At the time, therefore, when the motion was made to strike the case from the calendar, the case was rightfully and properly on the calendar. New York and Minnesota have similar statutes concerning notices of trial and notes of issue. Sec. 977, N. Y. Code Cl. Pro.; Sec. 5362, Stat. of Minn. 1894; *Stevens v. Curry*, 10 Minn. 316; *Griggs v. Edelbrock*, 61 N. W. Rep. 555; *Minrath v. Teachers' L. & I. Co.*, 21 N. Y. Supp. 204; § 5296, Rev. Codes; § 542 N. Y. Code Civ. Pro.; Ch. 66, § 123, Minn. Stat. 1878. When an amended answer is not interposed in good faith the court may require the trial to proceed at once upon the notice of trial originally given. *Minrath v. Teachers, etc. Co.*, 21 N. Y. Supp. 204. The object of technical rules is to promote justice or to prevent injustice. *Peo. v. Tweed*, 5 Hun. 353. This court can take judicial notice of proceedings in this case, and of statements in Judge Glaspell's affidavit used upon

proceedings to settle statement of case on appeal had before this court, wherein he says: "I was prompted to deny the application of the defendants to strike the case from the calendar for the reason that it had been admitted to me by counsel for the defendants that they had no defense to the merits of the case and did not intend to go to trial upon the facts and expected merely to make a fight for delay." *National Bank of Monticello v. Bryan*, 13 Bush. (Ky.) 419; *Schneider v. Hesse*, 9 Ky. Law Rep. 814; *Day v. Town*, 107 N. Y. 148, 13 N. E. Rep. 915. The production of record evidence is sometimes allowed in an appellate court for the purpose of sustaining a judgment. Being in its nature uncontrovertible it would be idle to send the case back for a new trial for the sole purpose of admitting it. *Dunham v. Townsend*, 23 N. E. Rep. 367; *Thornton v. Webb*, 13 Minn. 498; *State v. Bowen*, 16 Kan. 495; *Brucker v. State*, 19 Wis. 566; *Fredericks v. Davis*, 13 Pac. Rep. 125; *Day v. Town*, 13 N. E. Rep. 915; *Charlotte v. Carpenter*, 62 N. Y. 639; *Wines v. Mayor*, 70 N. Y. 613; *In re Cooper*, 93 N. Y. 587.

YOUNG, J. This is an appeal from a judgment and decree of foreclosure rendered and entered by the District Court of Stutsman county at the regular July, 1899, term. The case appeared upon the trial calendar for that term, and when the case was reached upon a call of the calendar the defendants interposed a motion to strike it from the trial calendar upon the grounds that it was not properly on the calendar, for the reason that no note of issue had been filed, and notice of trial had not been served, as required by section 5422, Rev. Codes. This motion was denied, and an exception was taken to the ruling by defendants' counsel. The court then proceeded with the trial of the case, and plaintiffs introduced their testimony. The defendants offered no testimony. Judgment was ordered and entered in favor of the plaintiffs as prayed for in their complaint. Defendants appeal from the judgment, and specify as error the denial of the motion to strike the case from the trial calendar, and, for the purpose of securing a review of the alleged error in denying their motion, have caused a statement of the case to be settled and incorporated into the judgment roll, embracing such facts as are material to an inquiry into the correctness of the order complained of.

It appears that the case had appeared upon the trial calendar at two previous terms of court upon a demurrer to the answer, viz: at the July, 1898, term, and the January, 1899, term; further, that the plaintiffs had filed a note of issue with the clerk, and served defendants with a notice of trial, entitling them to bring the case upon the calendar upon an issue of law, and the case to trial upon the law issue at the term of court first mentioned. In fact, it is not contended that it was improperly on the calendar at either of these terms. But it is clearly made to appear that it was on the trial calendar upon an issue of law only; also, that the note of issue filed and notice of trial served specified the issue to be tried as one of law, which was entirely correct, as the case was then

pending upon an issue of law only. No other note of issue has since been filed, and no other notice of trial has ever been served. The demurrer was overruled at the July, 1898, term, and an appeal was at once perfected by the plaintiffs from the order overruling it, and an undertaking given, suspending all further proceedings in the District Court pending the determination of the appeal by this court. The appeal was heard at the October, 1898, term, and an order was made reversing the order of the District Court, and directing that court to enter an order sustaining the demurrer. See *Oswald v. Moran*, 8 N. D. 111, 77 N. W. Rep. 281. The remittitur from this court was filed in the District Court December 3, 1898, and the clerk of the District Court thereafter placed the case upon the trial calendar for the regular January term of court, which convened January 3, 1899. The issue of law raised by the demurrer was finally disposed of at this term by the entry of an order by the District Court sustaining the demurrer pursuant to the directions of this court. An order was also made giving the defendants permission to serve an amended answer. Thus, it will be noted the issue of law was finally disposed of at the January, 1899, term. Subsequently an issue of fact was joined by the service of the amended answer and plaintiff's reply thereto. The plaintiffs thereafter took no steps to bring the issue of fact to trial, either by filing a note of issue or serving a notice of trial. The clerk of the Court, however, of his own volition, placed the case upon the trial calendar for the July, 1899, term of court, where it appeared when the motion to strike here in question was made.

Was it error to deny the motion to strike the case from the trial calendar, under the circumstances we have detailed? We are of the opinion that it was, and that the subsequent proceedings which culminated in the judgment appealed from were accordingly wholly irregular, and require a vacation of the judgment. Section 5422, Rev. Codes, prescribes the step which it is necessary for a party to a civil case pending in the District Court, after issue joined, to pursue, to bring such issues to trial and upon the trial calendar. These embrace, among other things, the service of a notice of trial at least ten days before the term of court, and the filing of a note of the issue to be tried with the clerk at least eight days prior to the opening of the term. It is the respondents' contention that inasmuch as the case had been upon the trial calendar at two previous terms, even though it was upon an issue of law only, it was not necessary to file a new note of issue and serve a new notice of trial, to give the case a place upon the trial calendar, and entitle them to bring it to trial upon the issue of fact. We do not think section 5422, *supra*, will bear this interpretation. It is plain that this section deals with two kinds of issues, namely, those of law and those of fact, and recognizes them as inherently distinct. The former arise upon a demurrer, and are determined by the judge alone, while the latter involve the hearing of testimony either by the court or a jury. It seems to us that the re-

quirement that a note of issue shall be filed with the clerk, when read in the light of its obvious purpose, which is to give it a place upon the trial calendar according to the date of the issue, and also to inform the court what the issue is, plainly requires that the party seeking to place a case upon the trial calendar shall state in the note of issue furnished to the clerk whether it is one of law or one of fact. For similar reasons, a notice of trial, which, when served, covered but the issue of law arising on a demurrer, cannot be expanded to cover an issue of fact. Such a construction would destroy the necessity of notice to the adverse party, which is the principal object the section referred to has in view. In the case at bar the issue of law was finally disposed of at the January, 1899, term of court, by the court's order sustaining the demurrer; and the clerk was thereafter without authority, in our opinion, to place the case upon the trial calendar upon an issue of fact, in the absence of the filing of a new note of issue. Neither were the plaintiffs then in a position to bring the issue of fact, which was joined after the final disposition of the demurrer, to trial, by reason of failing to serve a new notice of trial after such issue was joined. And we do not think that the provision that "there need be but one notice of trial and one note of issue from either party and the action must then remain on the calendar until disposed of" conflicts with the foregoing conclusions. The manifest object of the provision just quoted was merely to relieve a party who has taken the necessary steps to secure a trial of an issue of fact or an issue of law from the necessity of serving a new notice of trial, and filing a new notice of the issue, to bring the case upon the calendar, and the issue to trial at a subsequent term of court, in case it is not disposed of at the first term. It clearly refers to a continuation of the case upon the trial calendar upon the same, and not upon a new or different issue. Having reached the conclusion that the note of issue which was filed had accomplished its purpose when the demurrer was disposed of, and that the case was thereafter improperly upon the trial calendar, it follows, for the same reasons, that the notice of trial which was served to bring that issue to trial was thereafter ineffective, also, for any purpose. The case was then not properly on the trial calendar, and the denial of the defendants' motion to strike the same therefrom was error, for which the judgment must set aside.

We reach the same conclusion upon another ground, namely, the failure of the plaintiffs to serve a new notice of trial after the case was returned to the District Court for further proceedings after the determination of the appeal by this court. This would be true even had the notice of trial which was served in this case covered the issues of fact. In our view, the effect of an appeal accompanied by an undertaking such as is found in this case, suspending all further proceedings in the District Court pending the appeal, is to render a notice of trial theretofore served unavailing as a basis for subsequently bringing the case to trial in the District Court

in case it is returned for that purpose. A new notice of trial is necessary under such circumstances. This is the conclusion reached by the Supreme Court of Minnesota under a similar statute. *Mead v. Billings*, 45 N. W. Rep. 228. That court, in the course of its opinion, said: "The notice of trial is required, to enable the adverse party to prepare for trial. It is a matter of right that this opportunity be given for preparation by notice, before a party can be compelled to go to trial, although of course, this might be waived."

* * * We understand that the stay bond provided for by statute was given, so that the power of the District Court to proceed to the trial of the cause was suspended. The parties could not know when a decision of the Supreme Court upon the appeal would be rendered; nor, of course, could they know whether the order of the District Court granting a new trial would be sustained or reversed. Hence they could not know whether the case was to be tried again or not, nor if, to be tried, when the trial could be had. They should not, therefore, be required to be prepared for trial at any time, and without notice. If no notice of retrial was required under such circumstances, a party might be compelled to go to trial on the very day of the cause being remanded to the District Court, and this might be just as a term of court was drawing to a close; and if the case should then be called upon the motion of a party, and if the adverse party were absent, the case might be disposed of as upon his default."

Neither do the facts, as they appear of record, warrant us in finding that defendants either waived notice of trial, or acquiesced in the act of the clerk in placing it upon the trial calendar at the July, 1899, term. This was the first term held after the issue of fact was joined. The defendants, without delay, made the motion to strike it off upon the grounds stated. That motion should have been granted, for the reasons already stated, and for the error in denying said motion the judgment must be set aside. The District Court is accordingly directed to make an order vacating and setting aside said judgment. The appellants will recover costs of the appeal. All concur.

(82 N. W. Rep. 741.)

STATE OF NORTH DAKOTA vs. BARNEY MURPHY.

Opinion filed April 26, 1900.

Criminal Procedure—Continuance to Obtain Testimony of Non-Resident Witness.

Where, after issue joined in a criminal action pending in the District Court, the defendant is desirous of obtaining the testimony of a non-resident witness in his own behalf, and where the defendant desires a postponement of the trial or a continuance of the action over the term, to obtain such testimony, it is incumbent upon him to apply to the court or judge, upon notice to the county attorney, for the issuance of a commission out of, and under the seal of, the court, to

take such testimony. Nor can an application for a continuance or postponement to take such non-resident testimony be granted except in connection with an application for a commission. The statute regulates the practice in such cases and its provisions must be substantially complied with. Rev. Codes 1895, §§ 8385-8389.

Continuance Properly Denied.

Facts stated in the opinion considered, and *held*, that defendant's application for a continuance in this case was properly denied.

What Application for Continuance Must Show.

Held, further, that the foundation for the motion for a continuance was insufficient in substance.

Error Without Prejudice.

Held, further, under the facts stated in the opinion, that a verbal error in the trial court's instructions to the jury did not, under the circumstances of this case, operate to defendant's prejudice.

Appeal from District Court, Barnes County; *Glaspell, J.*

Barney Murphy was convicted of robbery, and appeals.

Affirmed.

Zuger & Paulson, for appellant.

Upon the showing made in this case it was error for the court to deny the motion for a continuance. *Gandy v. State*, 43 N. W. Rep. 747; *Miller v. State*, 45 N. W. Rep. 451; *Newman v. State*, 35 N. W. Rep. 194. Any cause that would be considered a good one for postponement in a civil action is sufficient in a criminal action. § 8141, Rev. Codes. On proper showing a defendant is entitled to a continuance as matter of right. The word "may" as used in the statute means "must." *State v. Kent*, 4 N. D. 577, 62 N. W. Rep. 631. And this is especially true upon a first application. *Texas & Pac. Ry. Co. v. Yates*, 33 S. W. Rep. 291; *Cunnen v. State*, 22 S. E. Rep. 538; *Clark v. State*, 33 S. W. Rep. 224. The affidavit of the accused for the purposes of the motion is taken as true. *State v. Dakin*, 3 N. W. Rep. 411; *Hair v. State*, 16 N. W. Rep. 829; *Gandy v. State*, 43 N. W. Rep. 747; *Miller v. State*, 45 N. W. Rep. 451; *State v. Abshire*, 17 South. Rep. 141; *Barton v. McKay*, 54 N. W. Rep. 968. The state did not controvert the allegations of defendant's affidavit nor did the state admit as true what defendant claimed he could prove by his absent witnesses. Poverty of the defendant, who is under disability by reason of imprisonment, may suffice to excuse want of preparation for trial. *State v. Hogen*, 22 Kan. 490; *Newman v. State*, 35 N. W. Rep. 194. It is not necessary for a defendant to use diligence to procure witnesses until after indictment found. 4 Enc. Pl. & Pr. 856. The instructions of the court as to the date when the offense was committed were conflicting and prejudicial. 11 Enc. Pl. & Pr. 149; *State v. Keasling*, 74 Ia. 328, 38 N. W. Rep. 397.

Edward Winterer, State's Attorney, and *John F. Cowan*, Attorney General, for respondent.

The affidavits presented by appellant in support of his motion for continuance contain averments that defendant was in St. Louis county, Missouri, on September 14th, 1895, and previous and subsequent thereto. The date when defendant was accused of robbery in North Dakota was September 25th, 1895, eleven days later than the time set in these affidavits. The testimony of the absent witnesses, if obtained, was immaterial to prove an alibi. An erroneous instruction is harmless when it appears from the instruction as a whole that the jury could not have been misled thereby. *Town v. Lumber Co.*, 39 Atl. Rep. 1019; *Gulf, etc. Ry. Co. v. Johnson*, 43 S. W. Rep. 583; *Peo. v. Boggs*, 20 Cal. 433; *Rock Island, etc. v. Krapp*, 50 N. E. Rep. 663. When the evidence fully sustains the verdict an erroneous instruction is harmless. *Evans v. Merritt*, 45 S. W. Rep. 212. Error in giving instructions will be disregarded when the verdict was clearly right under the evidence. *Davis v. Gilliam*, 44 Pac. Rep. 119; *Secor v. Oregon Imp. Co.*, 45 Pac. Rep. 654; *Rose v. Bradley*, 65 N. W. Rep. 509. Error is also without prejudice when it concerns a matter about which there was no contention. *Rawson v. Ellsworth*, 43 Pac. Rep. 934.

WALLIN, J. The defendant in this action was found guilty of the crime of robbery in the first degree, and was sentenced to a term of 25 years in the penitentiary at Bismarck. A motion for a new trial made in defendant's behalf was denied by the District Court, and the case is brought to this court for review.

Two errors are alleged as occurring at the trial: Counsel claim that the trial court erred in denying a motion to postpone the trial from the December term of the District Court, 1899, until the June term, 1900; and, secondly, contend that certain instructions given to the jury, and hereafter referred to, were erroneous and prejudicial to the substantial rights of the defendant.

The part of the record necessary to consider shows that the information against the defendant was filed by the state's attorney on December 11, 1899, and on that day defendant was arraigned. It then appeared that defendant was financially unable to employ counsel, whereupon one of the defendant's counsel in this court (A. P. Paulson, Esq.) was appointed by the District Court to defend the accused, as his attorney in this action. Defendant was given one day to plead to the information, and on the following day, December 12th was brought into court, and then entered a plea of not guilty, and was thereafter remanded to the custody of the sheriff. On December 15, 1899, the case was called for trial, whereupon a motion was made in defendant's behalf to postpone the trial until the next term of the court, which was to convene in June, 1900. This motion, as finally presented on the 16th of December, was made in writing, and was based upon certain affidavits and exhibits, which are as follows: First, defendant's own affidavit, which refers to another affidavit made by certain citizens of St. Louis county, Mo.,

and a certain letter written by a justice of the peace who took the Missouri affidavits, and the affidavit of defendant's counsel, A. P. Paulson. Defendant's affidavit, after omitting formal and immaterial parts, is as follows: "Barney Murphy, being duly sworn, says that he is defendant in the above entitled action. * * * Affiant further states that he cannot safely go to trial in this action without the testimony of certain material witnesses, residing out of the state, and now residing in the State of Missouri, as follows: Walter Stebbins, Sidney Bickley, M. J. Murphy, W. M. Travis, H. J. Schmees, Wm. Wescott, Mr. Fox, K. H. Atkinson, J. A. Mitchell, and Stephen Petri, all of Maplewood, near the City of St. Louis, in the State of Missouri. Affiant further states that he expects to prove by said witnesses the fact that he was at or near Maplewood, in St. Louis county, Missouri, on the 25th day of September, 1895,—the time it is charged in the information herein that he committed said crime in the County of Barnes, N. D." After stating, in substance, that he wished to take the depositions of said witnesses, and that a postponement of the trial would be necessary to enable him to do so, the affidavit proceeds as follows: "In support of his allegations in this affidavit contained, affiant refers to and attaches the affidavit of said witnesses, taken before Eugene Hansman, notary public of St. Louis county, Mo., on November 27, 1899, and marked 'Exhibit A,' and a letter from said Eugene Hansman, dated at Maplewood, Mo., November 27, 1899, and addressed to Hans C. Stenshoel, marked 'Exhibit B.'" Exhibit A is an affidavit purporting to be made and signed on November 27, 1899, before Eugene Hansman, a notary public and justice of the peace of St. Louis county, Mo., by the persons named in defendant's affidavit. The material feature of Exhibit A read as follows: "(The affiants) who, being duly sworn upon their oaths, do state that upon the 14th day of September, A. D. 1895, one Barney Murphy was in the County of St. Louis and State of Missouri, and furthermore state that previous to September 14, and after September 14, 1895, he was in said county and state; * * * that the said Barney Murphy is one and the same person now incarcerated in the Valley City jail, North Dakota." The letter of Eugene Hansman, inclosing Exhibit A to the sheriff of Barnes county, embraces nothing pertinent to the question of the whereabouts of the defendant on September 25, 1895, and hence need not be further mentioned. The affidavit of defendant's counsel stated, in effect, that the defendant had informed him that he desired to take the depositions of said persons residing in Missouri, and that, for lack of time, said depositions could not be taken unless the trial was postponed until the next ensuing term, and that the said counsel was informed by the defendant that he could prove by said witnesses that the defendant was in the State of Missouri at the time of the alleged commission of the offense.

The question presented for determination is whether, under the circumstances of the case, and upon the showing made by defendant's

affidavits, it was prejudicial error to deny defendant's motion for a continuance of the case over the December term. Appellant's counsel cites in support of his contention section 8141, Rev. Codes 1895. This section authorizes a motion to postpone a trial in a criminal action, but it does not attempt to set forth the requisite grounds of any such motion, further than to declare that "any cause that would be considered a good one for a postponement in a civil action is sufficient in a criminal action whether urged by the state or by the defendant." Counsel have cited no provision of the Code, nor has the court found any, purporting to set out the requisites of an affidavit for a continuance to procure testimony in a civil action. The matter, not being regulated by statute, would be governed, therefore, by the settled rules of law applicable to applications for continuance in civil cases. It will be unnecessary, however, for reasons hereafter appearing, to examine the cases bearing upon the matter of an affidavit for a continuance in civil causes; and it will suffice to say here that it is now well settled that such affidavits must be explicit in their statements of the evidence and facts expected to be proven by an absent witness, and that the same are strictly construed, and, so far as such an affidavit is equivocal or uncertain in its statements, all intendments are taken against such statements. See 4 Enc. Pl. & Prac. p. 877, and notes. In the case under consideration the affidavits filed as a basis for the motion for a continuance show that the defendant desired a continuance over the December term to enable the defendant to procure the depositions of a number of nonresident witnesses named in the defendant's affidavit, who then resided in the State of Missouri, and that defendant expected to prove by such depositions that the defendant was not in Barnes county at the time the offense was alleged to have been committed, but was in St. Louis county, Mo. These affidavits bring the case within the provisions of the Code of Criminal Procedure (sections 8385-8397). These sections are explicit in their provisions, and point out in detail what course a defendant is required to pursue in order to obtain the depositions of nonresident witnesses, where their testimony is desired by defendant for use at his trial. These statutory regulations have been wholly ignored by the accused in the case at bar. Sections 8386 and 8387 declare, in effect, that, where an issue of fact has been joined in a criminal action in the District Court, the defendant, upon a specified affidavit, may apply to a court or judge thereof for an order that a nonresident witness may be examined on a commission to be issued out of, and under the seal of, the court, and upon interrogatories to be annexed to the commission. Section 8388 provides that such application "must be upon three days' notice to the state's attorney." Under section 8389 the court or judge is required, "if he is satisfied of the truth of the facts stated in the affidavit, and that the examination of the witness is necessary to the attainment of justice," to make an order, not only that a commission be issued, but, further, to order that the trial be stayed, or that the

case be continued, to the end that the testimony sought may be obtained and returned to the court from whence the commission issues. It does not appear from the record that any application was ever made in defendant's behalf for a commission to examine said non-resident witnesses, or any witness; nor does it appear that the state's attorney was served with any notice that an application for a commission would be made by the defendant. In brief, it is apparent from the record that these statutory provisions, expressly made to regulate the taking of the testimony of nonresident witnesses, to be used by a defendant in a criminal case, were wholly ignored. The writer of this opinion is clear that the practice indicated by the statute, which carefully details what a defendant in a criminal action shall do in order to produce the testimony of a non-resident witness, was intended to exclude other means and methods of taking such testimony and returning the same; and it is equally apparent that a motion for a postponement of a trial for the sole purpose of obtaining the deposition of a nonresident witness for the defendant can only be granted where the motion is made as part and parcel of an application for a commission as stated in the statute. Nor does this holding militate against the right to apply for a postponement of a trial under section 8141, *supra*. There are many and diverse grounds upon which a continuance may be granted in a civil action, and such grounds, under section 8141, are sufficient in a criminal action, provided that the ground of the application is not that of obtaining the testimony of a nonresident, to be used in defendant's behalf in a criminal action. Postponements for such cause for excellent reasons—to prevent abuse and vexatious delays—have been made the subject of specific legislative regulation, and the writer holds that these must govern, to the exclusion of other and different applications for delays and postponements of trials, where the same are made on other grounds.

I might add here, although not strictly pertinent to the grounds upon which I place my ruling, that in my judgment the basis for the motion for a continuance was insufficient in matter of substance. If the defendant was in fact in St. Louis county, Mo., on the day the offense was charged to have been committed, that fact could and should have been stated in defendant's own affidavit filed with the motion. It was not so stated. Defendant contented himself with the averment that he expected to establish that decisive fact by the affidavit of certain nonresidents who were named by him in his affidavit, and whose affidavits were attached to, and made a part of, defendant's intended affidavit. But, when the affidavits of such nonresidents are scrutinized, it appears that they fail wholly to show an alibi. They do not state in terms, or by necessary intendment, that the defendant was in the State of Missouri on the day the offense is alleged to have been committed, viz: September 25, 1895. They simply declare, in effect, that the defendant was in St. Louis county, Mo., on the 14th, and before and after the 14th day of September, 1895. This may have been strictly true,

but, if true, it is not inconsistent with the fact alleged, viz: that the defendant was in Barnes county, N. D., and committed a robbery there, on September 25, 1895. Counsel urge in argument that the affidavits were framed prior to the appointment of Mr. Paulson as attorney for the defendant, and hence that the same should be liberally construed, as the handiwork of a layman. It nowhere appears that the affidavits in question were drawn without the aid or advice of an attorney, but that fact would be unavailing if it had appeared. The motion to continue was not finally submitted until the 16th day of December, 1899, which date was five days after the formal appointment of Mr. Paulson as defendant's attorney. In this interval another affidavit could have been framed, curing the original defect in defendant's affidavit, and the same could have been re-enforced by the oath of defendant's attorney, if the fact existed, that the defendant had informed him that he was in Missouri at the time the offense was charged to have been committed. As already stated, the writer's conclusion upon this assignment of error is not based wholly or chiefly upon defects in the defendant's affidavit. Nevertheless I do not hesitate to state that I deem the same not sufficient to show that the testimony of the Missouri witnesses was necessary "to the attainment of justice." If, as a matter of fact the defendant did not commit this crime, and if, as a matter of fact, he was in Missouri on the 25th day of September, 1895, he is certainly in a very unfortunate position. He has, however, wholly failed to show the facts necessary to his defense, and failed to properly apply for a continuance of his case. But, while these considerations may properly weigh in an application for executive clemency, they cannot, in the face of a verdict of guilty, furnish grounds upon which a court of review can disturb the verdict.

One other point remains for brief consideration. It appears that the trial court, in instructing the jury, by an obvious inadvertence, referred to the date of the commission of the offense charged as occurring on September 25, 1899, whereas the true date, as charged, was four years prior thereto, viz: September 25, 1895. This erroneous reference to the date of the offense was repeated in the charge, and it is likewise true that the court more than once in its instructions referred to such date correctly, viz: as being September 25, 1895. We have examined the record with care, and find that the same is replete with undisputed testimony to the effect that the robbery in question was done on the 25th day of September, 1895, the day alleged in the information, and there is no pretense that the same was done at any other date or time. The jury found defendant guilty as charged, and this also shows that they found that the defendant committed the act in the year 1895. Under all the circumstances of the case, it is perfectly obvious to us that the erroneous allusion to the date of the offense could not and did not operate to create confusion in the minds of the jury as to the time of the commission of the offense. It is true, as counsel urge, that the date of the commission of the offense charged is peculiarly

important in this case, for the reason that more than four years intervened after the alleged date of the crime and the date on which the information was filed in court. These dates, when considered together, would show that the statute of limitations had run in this case against the prosecution of the defendant for the offense charged. Rev. Codes 1895, § 7877. But the information embraced an averment to the effect that the defendant was out of the state for a period of "three years since the commission of the offense." If this last-mentioned averment was shown to be true by competent testimony, the action was not barred. The record shows, by evidence not disputed, that the defendant had been residing in the State of Missouri for some two or three years next preceding the date of filing the information. There was no evidence offered and no claim made, which appears of record, that the defendant had resided continuously in this state after September, 1895. No claim is made that he had not been a resident of the State of Missouri for several years preceding the date of the trial. Under all the circumstances of the case, we have no hesitation in saying that the erroneous reference to the date of the offense, as made by the trial judge, could not have operated either to confuse the jury or otherwise prejudice any substantial right of the accused. The judgment must be affirmed. All the judges concurring.

BARTHOLOMEW, C. J. I concur in the disposition of the case made by the opinion written by Justice WALLIN, but, upon the matter of the refusal of the continuance, I base my concurrence upon the insufficiency of the affidavit upon which the continuance was asked. That affidavit fails to state as a fact that the defendant was not in Barnes county, N. D., on the date the crime is alleged to have been committed, or that defendant was in the state of Missouri on that day. It states generally that defendant expects to prove by certain witnesses that he was in Missouri on that date. That is affiant's conclusion. The affidavit does not state to what facts the witnesses will testify, nor does it state that the matters to which they will testify are true, or that the matter which he expects to prove by them is true. Everything stated in the affidavit might be literally true, and yet justice not require a continuance.

YOUNG, J. I concur in the affirmance of the judgment, but limit my concurrence expressly to the insufficiency of the affidavit for continuance, in the particulars mentioned in the concurring opinion of BARTHOLOMEW, C. J.

(82 N. W. Rep. 738.)

MOSES MERCHANT vs. MICHAEL PIELKE.

Opinion filed April 26, 1900.

Reformation of Contract.

The testimony in this case is of that clear and satisfactory character that warranted the trial court in reforming a written contract by reason of mutual mistake.

Appeal from District Court, Richland County; *Pollock, J.*
Action by Moses Merchant against Michael Pielke. Judgment for plaintiff, and defendant appeals.
Affirmed.

A. E. Sunderhauf and Merrill & Engerud, for appellant.

To justify a court in exercising its power to revise a contract fraud or mistake must be clearly proven. A mere preponderance of evidence will not suffice. What the parties have solemnly reduced to writing cannot be varied or overthrown by oral proof unless the clearest evidence of mistake or fraud is produced. *Clute v. Frazier*, 12 N. W. Rep. 327; *Newton v. Holley*, 6 Wis. 592. The same rule applies here as was announced in *Jasper v. Hazen*, 4 N. D. 1. The court cannot make a contract for the parties; it can only declare what the parties agreed upon and enforce the agreement. 2 Pom. Eq. Jur. § 859; *Page v. Higgins*, 5 L. R. A. 152 & n. If the parties signed the written instrument knowing of omissions they cannot ask the court for revision. *Ellison v. Fox*, 38 N. W. Rep. 358; 2 Pom. Eq. § 839; Rev. Codes, § 3852.

Smith Stimmel, for respondent.

The fact that defendant denies that there is a mistake, and testifies that the deed was drawn according to the intention of the parties will not prevent the court from granting relief. *Stines v. Hays*, 36 N. J. Eq. 369; *Beal v. Martin*, 67 N. W. Rep. 433; *Geib v. Reynolds*, 28 N. W. Rep. 923.

BARTHOLOMEW, C. J. This is an action in equity for the reformation of a contract. The plaintiff was successful in the District Court, and defendant brings the entire case to this court for a retrial. The issues are exclusively issues of fact, and will be treated as briefly as may be consistent with an understanding of the case. Any extended discussion of the testimony would prove unprofitable.

The defendant is the owner of a tract of land in Richland county consisting of nearly 400 acres. Of this amount, about 300 acres, roughly speaking, are cultivated and meadow lands. The remainder is pasture and timber land. It is all in one body. In the summer of 1898 there were on this farm one dwelling house, a large frame barn, two frame granaries, known as the large and the small granary, respectively, a log stable, a hog barn, and chicken house. On July 9, 1898, the parties went to the office of one Tweto, in the Village of Abercrombie, for the purpose of having a contract drawn between them pursuant to certain agreements already made, whereby plaintiff was to occupy and use the farm for a period of five years, and until the end of the cropping season of 1903. A contract was drawn and signed, and in October following, plaintiff moved his family, with his stock and machinery, onto the farm. At that time defendant was building a new dwelling house on the farm, only a few feet from the old dwelling house. As the new house was not completed, both families occupied the old until in November, when defendant, with his family, moved into the new. In the spring and summer

of 1899 differences arose between the parties as to the right of possession in certain buildings on the farm, and of the pasture and meadow land, and these differences became so accentuated that injunctions and counter injunctions, and arrests and counter arrests, became quite common. The whole controversy hinged upon the nature of the contract. If that was what is known as a "cropper's contract,"—a contract under which plaintiff's right of possession would extend only to such land and buildings as were specially granted,—then defendant was in the right. If, on the other hand, the relation of landlord and tenant existed,—if the contract was a lease, under which the lessee would be entitled to the possession of all the land and buildings not specially reserved,—then the plaintiff was right in his contention. In form, the contract was what is usually termed a "cropper's contract." It was on the same blank form that was before the court in *Angell v. Egger*, 6 N. D. 391, 71 N. W. Rep. 547. We there said that some of the provisions seemed to be inconsistent with anything but a lease. But there are other provisions by which the second party, for a consideration to be paid by the first party, agrees to crop the land for the year or years specified, and that consideration is a certain share of the grain raised. The plaintiff in his complaint sets forth the oral contract entered into between the parties on July 4, 1898, five days before the written contract was made. The contract as thus set forth was clearly a contract of lease, and it is averred that it was the purpose and intention of both parties to have the oral contract thus made reduced to writing, but that, by the mutual mistake of both parties at the time of the execution of the written contract, it does not truly or correctly state the agreement between the parties, and he asks to have the contract reformed to correspond with the intention of the parties. The answer denies generally the mistake as alleged by plaintiff, but asserts that the contract was incorrect in certain particulars that would make it more favorable to the defendant.

The trial court so far reformed the written contract as to make it a technical lease, with certain reservations; and in this we reach the same conclusion, on a full review of the evidence, that was reached by the trial court. We recognize and apply the rule for which appellant contends, and which requires the proof upon which a written instrument shall be changed and reformed by reason of mutual mistake to be clear and convincing. But there is very little real conflict in the testimony. Plaintiff claims that all the details of the contract were agreed upon on the 4th day of July, 1898. It stands admitted that defendant and his wife visited plaintiff on that day for the purpose of making an agreement about the farm. There were present at that interview the defendant and his wife, the plaintiff and his wife, and one Stone, who was in the employ of plaintiff. In all points where there is a difference between the parties as to what took place that day, plaintiff has the preponderance of the testimony. Defendant will not admit that the contract was com-

pleted on July 4th, and his counsel urge upon us that nothing but a preliminary outline was agreed upon until the writing was made, and that the writing presents the first real contract that was made. Defendant, however, concedes that on July 4th he requested Mr. Stone to write a note for him to a man who had been negotiating for the farm, informing him that he could not have it, as plaintiff was going to have the whole farm, and that the note was so written and delivered. He also testifies as to what took place when they went to the scrivener's, as follows: "I said to Tweto, let Merchant tell you what he is going to have to do, and then Merchant spoke the whole story right along. Merchant said he was to rent the farm, and draw the manure, and do the road work. He stated the contract all right." It is clear from this that the contract had already been made, and the contract as then stated by Merchant to Tweto, as is fully shown by other witnesses, was clearly a contract of lease. When the point was reached for the description of the land, defendant could not give the description. He knew the section, township and range, and that there were at least 300 acres; and at the suggestion of the scrivener it was described as "about 300 acres, more or less, in section 5, township 135, range 48, known as the 'Pielke Farm.'" This ordinarily would cover all the land in the one body, belonging to the one owner, and used in connection with his farming business. But, by reason of certain statements made at the time, it was clear that it was not the intention to include the wood land. The trial court excluded the wood land from the operation of the lease. But it included the meadow land and the pasture. At the time the contract was made, defendant expected to acquire property in Abercrombie and live in town, and the undisputed evidence shows that he repeatedly made efforts so to do, and stated that he had rented his farm. But their contract did provide for a division of possession as to the buildings. The defendant was to furnish all seed grain, under the terms of the contract, and he stated that he would want granary room therefor. As it was the expectation to haul all grain that was not to be used on the farm directly to the elevator as fast as threshed, plaintiff stated that he would only need granary room for his feed. But no reference was made to the granaries in the written contract. The court held that the defendant in fact reserved the large granary. Defendant also stated that he might keep a driving team and a few cows on the farm, and he wished to reserve barn room for such stock and for the hay for their use, and to that end he reserved one-half of the large barn. The scrivener made the provision as to buildings read: "Moses Merchant is to have full control of the dwelling house now on the farm, and one half the barn room now on the farm." The decree of the court reforms that to correspond with the intentions of the parties. As the new house was erected with full knowledge of plaintiff after the execution of the lease, and he in no manner objected thereto, the court held that defendant was entitled to use and occupy the same, with the road or driveway.

leading to and from the house. There are other points of difference between the parties that are settled by the decree. We need not specially notice them. The surprise that arises from the fact that these parties signed a contract which each now says fails in some respects to express the intention of the parties is much lessened when we remember that these parties are foreigners of different nationalities, having but limited use of the English language, and that the scrivener employed is a foreigner of still another nationality; having, as shown by his testimony, no correct knowledge of technical terms, and no conception of the difference between a cropping contract and a lease. The task of the trial court in ascertaining what these parties mutually intended to do, and what they mutually thought they were doing, when they executed the contract, was a difficult one, but we are convinced that the court meted out even-handed justice as nearly as was possible under the circumstances. The judgment and decree of the trial court are made the judgment and decree of this court, and are in all things affirmed. All concur. (82 N. W. Rep. 878.)

STATE OF NORTH DAKOTA *v.s.* CHRISTIAN MESSNER.

Opinion filed April 28, 1900.

Action for Penalty—Parties.

An action cannot be maintained in the name of the state to recover the penalty specified in section 1686, Rev. Codes.

Action for Penalty in Name of Person Beneficially Interested.

Penalties can only be recovered in civil actions in this state by the party for whose benefit the recovery can be had.

Appeal from District Court, Cass County; *Pollock, J.*

Action by the State against Christian Messner. Judgment for plaintiff, and defendant appeals.

Reversed.

Ball, Watson & Maclay, for appellant.

Fred B. Morrill and Edward Engerud, for the State.

BARTHOLOMEW, C. J. This action was brought in the name of the state, and by the state's attorney of Cass county, against the defendant, a road overseer of the Town of Durbin, in said county, to recover the penalty of \$50, as specified in section 1886, Rev. Codes, by reason of the failure of the defendant to destroy noxious weeds as provided by sections 1683-1686, Rev. Codes. The defendant demurred to the complaint upon two grounds. The first, and only one that we shall consider, raised the question of the plaintiff's capacity to sue. From an order overruling the demurrer, the defendant appeals to this court.

Section 1686, Rev. Codes, reads: "Whenever an overseer of

highways or supervisor shall neglect or refuse to comply with the provisions of this article after having received notice as provided for herein, he shall be subject to a fine of fifty dollars, and it is the duty of the state's attorney to enforce the provisions of this article." Nothing whatever is said as to the disposition of this fine when recovered. It is not a fine or penalty imposed as a punishment for crime, and hence is clearly recoverable in a civil action under section 5785, Rev. Codes. The following section (5786) declares: "Such action shall be brought as follows: (1) If the entire recovery is payable to the state by the attorney general or the state's attorney of the proper county in the name of the state. (2) If the entire recovery is payable to a public corporation the action shall be brought in the name of such corporation by its proper legal officer. (3) If the recovery is payable partly to the state or public and partly to an individual, an action may be brought by such individual or by the state or public corporation, as the case may be, or by such individual and the state or public corporation." It will thus be seen that no party is authorized to sue for such penalty, or any part thereof, unless the recovery of the penalty is in whole or in part for the benefit of such party. The statute is restrictive. Nor have we any general provision directing a disposition of such penalties in the absence of special provisions. If it were a fine imposed as punishment for crime, it would go into the proper county treasury for the benefit of the school fund. Section 7736, Rev. Codes. But it is not such a fine. Section 5792 contains the following: "All moneys collected on account of any judgment under the provisions of this chapter, except such as are payable by law to an individual, shall be paid by the officer collecting the same to the treasurer of the state, or of the county, town, city or village entitled thereto, as the case may be, within twenty days after its collection or receipt by him." The money must be paid into the treasury "entitled thereto," and that means entitled thereto by some provision of law. We may not aid the statute by presumptions, and, if we could, we know of no reason why that presumption should be in favor of the state. Section 1119, Rev. Codes, provides for another penalty against this same officer for neglect of duty, but there it is specified that the penalty shall be "sued for by the chairman of the board of supervisors of the township and when recovered, applied by him in making and improving the roads and highways therein." It is true that there is a dictum in *Wiscasset v. Trundy*, 12 Me. 204, in which it is said that where a penalty is created, and no mode of recovery provided, and no person specified to whom it shall be paid, it may be recovered by the sovereign. It is there said that such is the law of England, and it may be the law in the absence of restrictive statutes. In *Colburn v. Swett*, 1 Metc. (Mass.) 232, it was held that, where a penalty was created for the benefit of certain parties, such parties could not authorize another to bring the action; and without deciding whether or not, in that particular case, the benefited parties might maintain the action, the court held that it might be recovered

by indictment or by the commonwealth. But clearly it could not be so recovered in this state, by the express terms of our statute. The matter is also discussed slightly in *Brownell v. Railroad Co.*, 164 Mass. 29, 41 N. E. 107, 29 L. R. A. 169; but all that is decided by that case is that, where the forfeiture is to the commonwealth, only the commonwealth can maintain an action for its recovery. Our statutes are, in substance, like those in New York. In *People v. Belknap*, 58 Hun. 241, 12 N. Y. Supp. 143, the court said: "The Code of Civil Procedure (sections 1893 and 1894) provides that, when a penalty is given by statute to an individual, he can sue for it in his own name. When the penalty is given to the people, the attorney general or district attorney must bring the action. Id. § 1962. These general provisions do not supersede special provisions of the statute authorizing actions for penalties in special cases, but they indicate the policy of the state, that no one shall use the name of the people of the state as a party plaintiff, except in pursuance of some enabling law. It is urged that this is not a question of the capacity of the people of the state to sue, but one of authority. But the people of the state are in this respect unlike an individual or domestic corporation. An individual not laboring under disability has a capacity to sue in whatever action he chooses to bring in his own name, however unsound his cause of action may be. So of the domestic corporation. But the people have no such general capacity. They have no capacity to sue for penalties, except as authorized by law; and not then, except through the officer or person authorized to bring the suit." If it is true, under our statutes,—and we think it is too clear for discussion,—that the state has "no capacity to sue for penalties except as authorized by law," then certainly the state cannot maintain this action. True, there is no other party who can maintain it. This is by reason of a legislative lapse. If the legislature intends that penalties shall be recovered in civil actions, it must designate for whose benefit the recovery can be had. Failing in that, the penalty cannot be recovered. The District Court will set aside its order, and enter an order sustaining the demurrer.

Reversed. All concur.

(82 N. W. Rep. 737.)

ALICE E. MAHNKEN vs. CHARLES E. MAHNKEN.

Opinion filed May 2, 1900.

Divorce—Mental Suffering.

Under section 2739, Rev. Codes, a decree of divorce may be granted in this state by reason of the infliction of grievous mental suffering, although such suffering produce no bodily injury.

Question of Fact.

But whether or not, in any given case, grievous mental suffering has been inflicted upon the complaining party, is purely a question

of fact to be determined from all the circumstances of the case, including the mental characteristics of the party complaining, so far as the same may be developed in the case.

Evidence Does Not Show Grievous Mental Suffering.

Upon full consideration of the evidence in this case, it is *held* that the testimony fails to establish the infliction of grievous bodily injury or grievous mental suffering.

Appeal from District Court, Cass County; *Lauder, J.*

Action by Alice E. Mahnken against Charles E. Mahnken. Judgment for defendant, and plaintiff appeals.

Affirmed.

David R. Pierce and *George H. Phelps*, for appellant.

The test of extreme cruelty under our statute where there is no personal physical violence is conduct which inflicts upon the innocent party grievous mental suffering. § 2739 Rev. Codes. Grievous mental suffering is sufficient ground for divorce as extreme cruelty although it does not impair the health. *Barnes v. Barnes*, 95 Cal. 171, 30 Pac. Rep. 298; *Fleming v. Fleming*, 95 Cal. 439, 30 Pac. Rep. 566; *Smith v. Smith*, 119 Cal. 183, 48 Pac. Rep. 730. Any unjustifiable conduct upon the part of either the husband or the wife which so grievously wounds the mental feelings of the other or so utterly destroys the peace of mind of the other as to utterly destroy the legitimate ends and objects of matrimony constitutes extreme cruelty, although no physical violence may be inflicted or even threatened. *Carpenter v. Carpenter*, 2 Pac. Rep. 122; *Gibbs v. Gibbs*, 18 Kan. 419; *Bennet v. Bennet*, 24 Mich. 151; *Whetmore v. Whitmore*, 49 Mich. 417; *Caruthers v. Caruthers*, 13 Ia. 266; *Wheeler v. Wheeler*, 53 Ia. 511; *Smith v. Smith*, 6 Ore. 100; *Kennedy v. Kennedy*, 73 N. Y. 369; *Latham v. Latham*, 30 Grat. (Va.) 307; *Cook v. Cook*, 3 Stock. 195; *Beyer v. Beyer*, 50 Wis. 254; *May v. May*, 62 Pa. St. 206; *Beebe v. Beebe*, 10 Ia. 133. Though habits of intoxication do not form sufficient grounds for divorce in favor of the wife, they are material to be considered in connection with other objectionable acts on his part as tending to show greater liability of a recurrence of ill treatment than if he were sober. *Rodman v. Rodman*, 20 Grant. Ch. (N. C.) 428; *Coursey v. Coursey*, 60 Ill. 186; *Harman v. Harman*, 16 Ill. 85. Habits of profanity may be considered in connection with habits of intoxication as giving color to his conduct. *Powers v. Powers*, 20 Neb. 529. A course of systematic ill treatment, consisting in continual scolding, and fault finding, using unkind language, studied contempt, and many other petty acts of a malicious nature, when sufficiently long continued and when producing sufficiently serious results, constitute cruel and inhuman treatment and are sufficient grounds for granting a decree. *Marks v. Marks*, 57 N. W. Rep. 651.

John E. Greene and *R. M. Pollock*, for respondent, filed a printed argument without citation of cases.

BARTHOLOMEW, C. J. Plaintiff brought an action for divorce against the defendant on the statutory ground of extreme cruelty. The complaint shows that these parties were married on June 28, 1889; that three children have been born of said marriage, the youngest being now three years old. It is alleged that for three years last past the defendant has treated the plaintiff with such extreme cruelty as to cause her to suffer extreme anguish of mind and grievous mental and physical suffering. The complaint specifies specially cruel treatment on May 1, 1897, and on May 1, 1898; and on November 1, 1898. There is also a general specification that whenever store bills were presented to defendant for payment he would treat plaintiff with extreme cruelty; and also that the defendant was addicted to the use of intoxicating liquor, and when under the influence thereof he became specially abusive. This abuse was all in the form of language. No physical ill treatment is claimed. The defendant answered, in denial, and also by way of cross bill alleging extreme cruelty on the part of plaintiff. His specifications need not be noticed. After a prolonged trial, and the examination of a large number of witnesses, the trial court found that the allegations of extreme cruelty were not proven upon either side, and the court dismissed both the complaint and the cross bill. The plaintiff appeals, and asks a retrial of the case.

We have carefully studied the testimony from first to last, and in the light of the comments made thereon by counsel, and we are unable to reach a conclusion differing from that of the trial court. As defendant has not appealed, he can ask nothing affirmative at the hands of this court. His allegations of cruelty are material only so far as they may tend to establish recrimination. But the proofs so far failed to establish that cruelty demanded by the statute as constituting any ground for divorce that we dismiss defendant's charges without further notice. Plaintiff's proofs cannot, however, be thus summarily dismissed. Preliminary to any discussion of it, we may state generally that the record shows that when these parties were married defendant had ready means in the sum of about \$10,000. His annual income since that time has been about \$2,500. Plaintiff at the time of the marriage owned some unimproved city property in Fargo. One tract of it adjoined her father's home. Upon this tract defendant, with his own means, erected a dwelling house at a cost of about \$5,000. The parties resided in this house from 1892 until their separation in October, 1899. The house was at least comfortably furnished. The annual expense of maintaining the home and family was about \$2,000. It was a home of comfort and some luxury, and we think from the evidence we are justified in saying that in the main it was the home of average happiness. But this was not always true. There were differences in the characteristics of the husband and wife, which, while not more marked than are often found, were yet of a nature to produce friction. The defendant is frugal in his habits and by nature. His

counsel on one occasion applies to him the term "close-fisted," and it may not be inappropriate. He was, at least, careful of his earnings and thoughtful for the future. The plaintiff's evidence shows her to care more for the present. She is evidently more liberal in her views of appropriate expenditures; not that the evidence establishes extravagance on her part, but she was not in sympathy with the conservative views of her husband. All their real differences seem to revolve around this one point of expenditures. As head of the family, the right must be conceded to the husband to control the family expenses. We, however, regard it as proven that the defendant, when irritated by bills presented, or by the requests of his wife for money, used towards her on several occasions language that cannot be justified under any circumstances. Yet, conceding this, we are well satisfied that this conduct did not constitute extreme cruelty as defined by our statute. Section 2739, Rev. Codes, declares: "Extreme cruelty is the infliction by one party to the marriage of grievous bodily injury or grievous mental suffering upon the other." It is claimed, and there is evidence in the record tending to show, that the language used by defendant towards his wife caused a nervous sickness on three several occasions, so serious that the visits of the family physician were necessary. We cannot, however, regard this as proven. The family physician, who is also the family physician in plaintiff's father's family, testifies that he has no recollection of ever treating plaintiff for any nervous disorders, or ever treating her except at confinement, and that her general health is good. It is quite clear, we think, that the use of the offensive language did not inflict grievous bodily injury upon plaintiff. But under the later and better construction of statutes similar to ours it is held that the grievous mental suffering may be sufficient to warrant a divorce under the statute, and yet may be productive of no perceptible bodily injury. *Barnes v. Barnes*, 95 Cal. 171, 30 Pac. Rep. 298, 16 L. R. A. 660; *Smith v. Smith*, 119 Cal. 183, 48 Pac. Rep. 730, 51 Pac. Rep. 183; *Carpenter v. Carpenter*, 30 Kan. 744, 2 Pac. 122. But whether or not this grievous mental suffering has been inflicted in any particular case is purely a question of fact to be determined from a consideration of all the circumstances of the case, including the mental characteristics of the party complaining so far as they may be developed. *Fleming v. Fleming*, 95 Cal. 430, 30 Pac. Rep. 566. But it is very evident that courts here tread upon delicate, and perhaps uncertain, grounds. The differences in mental characteristics are as varied as the difference in facial expression. The effect upon two minds of the same act or language may be entirely different, and the effect upon one may be incomprehensible to the other. It is clear, then, that no standard can be erected, no measurements given, and no criterion established by which to gauge mental suffering. This is a point upon which this court would be inclined to give much weight to the views of the trial court. The complainant was before that court, and was examined at great length. All her mental characteristics would be much more

apparent there than they can be from a study of the record. Yet the record discloses that plaintiff is a very intelligent woman, with a strong, and perhaps self-asserting, nature, and ambitious, socially and otherwise. We certainly cannot read that she is supersensitive. Plaintiff testifies that in May and June, 1897, immediately following the unpleasantness of May 1, 1897, upon which great stress is laid, "I was chairman of the women's committee which was arranging for the Shrine parade, and I was on several other committees, and my duties as chairman of the general committee and a number of other committees occupied a good deal of my time." This testimony was given to rebut certain testimony introduced by defendant in support of his cross bill to the effect that plaintiff spent an undue amount of time on the streets, and away from her home and children. While it answered that purpose, it also showed conclusively that a woman who could enter thus heartily into public affairs, and become absorbed in public duties that occupied so great a portion of her time, was not at the same time enduring grievous mental suffering by reason of the cruelty of her husband. Again, in 1898, and following close upon one of those episodes which it is alleged produced not only mental suffering, but bodily injury, we find plaintiff in St. Paul, on means furnished by her husband, and writing him letters which might stand as models for happy, light-hearted, and affectionate wives to send to absent husbands. We find no evidence in this case of the infliction of that grievous mental suffering that the law requires to justify the granting of a divorce. No doubt the language used by defendant would produce anger in a proud-spirited woman. But it is not for that cause that the marriage contract can be annulled. That contract, while it imposes upon the parties thereto the imperative obligation never to unnecessarily anger or wound each other, yet it also imposes the duty of forgiveness of all those weaknesses, imperfections, and peculiarities to which humanity is ever prone. The sacred observance of that contract is demanded by many public interests. It is demanded by the interests of the immediate parties thereto, and more than all it is demanded for the proper nurture, protection, and training of the offspring that results from the marriage contract. The statutory grounds for divorce in this state are broad, and courts may not multiply divorces by granting them in cases not clearly within the statute. The judgment of the District court is made the judgment of this court, and is in all things affirmed. All concur.

(82 N. W. Rep. 871.)

JOHN A. GARDNER *v.*s. LOUIE S. GARDNER.

Opinion filed May 2, 1900.

Divorce—Extreme Cruelty—Evidence.

Action for a divorce. Evidence examined, and **held that the allegations of extreme cruelty stated in the complaint as grounds for relief are not sustained by a preponderance of evidence.**

Recrimination—Condonation.

In actions for a divorce, where defendant's answer sets out causes of action for a divorce against the plaintiff in recrimination and as a defense to the plaintiff's causes of action, it is competent for the plaintiff to show at the trial that the causes of action pleaded in the answer have been condoned by the defendant. It is likewise competent for the defendant to show at the trial that the defendant, the forgiving party, has not, since the condonation, been treated with conjugal kindness by the plaintiff. If this fact is made to appear, the condonation is ineffectual, and the recrimination alleged by answer may, despite the condonation, be shown to defeat the plaintiff's action.

Condonation Ineffectual as a Defense.

Evidence examined, and *held* that the condonation of the offenses set out in the answer as recrimination was not followed by conjugal kindness on plaintiff's part, and hence such condonation is ineffectual for any of the purposes of the case.

Appeal from District Court, Grand Forks County; *Morgan, J.*

Action by John A. Gardner against Louie S. Gardner. Judgment for plaintiff, and defendant appeals.

Reversed.

Corbet & Murphy, for appellant.

Evidence of statements and declarations of the injured party, made at the time or immediately after the commission of the wrongful act, where the party is laboring under great mental strain or excitement, indicating that the statements are made upon the impulse, without premeditation, are admissible as *res gestae* where the wrong complained of has been proven by other testimony. The corroborative evidence in this case, however, was not within the rule, but clearly hearsay. *Nelson*, on Div. & Sep. § § 109 and 321; *Huth v. Huth*, 30 S. W. Rep. 240. Plaintiff's evidence did not establish good faith in bringing this action, either as to the bona fides of his residence or in corroborative proofs. § § 2755 and 2757, Rev. Codes; *Graham v. Graham*, 9 N. D. 88, 81 N. W. Rep. 44. Mere rudeness of language, petulance of manner, austerity of temper, or even occasional sallies of passion, if they do not threaten bodily harm, do not constitute legal cruelty. *Dunn v. Dunn*, 42 N. W. Rep. 280; *Peavey v. Peavey*, 41 N. W. Rep. 67; *Gleason v. Gleason*, 19 N. W. Rep. 784; *Johnson v. Johnson*, 14 N. W. Rep. 670; *Burns v. Burns*, 60 Ind. 259; *Harper v. Harper*, 29 Mo. 301; *Nelson* on Div. & Sep. § § 286, 311, and 318. Appellant was provoked by respondent's conduct in causing his arrest. Having brought the difficulty upon himself, he cannot complain. *Nelson* on Div. & Sep. § 326; *McAllister v. McAllister*, 7 N. D. 324, 75 N. W. Rep. 256. There was strong evidence in the case that plaintiff had been guilty of adultery with Cara Weise and also with Celia Ryan. If everything was innocent and proper between plaintiff

and these parties his failure to produce them as witnesses upon the trial furnishes strong ground for distrusting plaintiff's evidence in denial of the charge. *Pond v. Pond*, 132 Mass. 219; *Bibby v. Bibby*, 33 N. J. Eq. 56; Nelson on Div. & Sep. § 194. For a year prior to the commencement of this action defendant had ceased her former course of conduct toward plaintiff, and plaintiff and defendant cohabited together during the last year. These circumstances amount to a condonation by him of all her previous offences. *Clague v. Clague*, 49 N. W. Rep. 198. It is not necessary to show an express agreement to condone. Condonation is inferred from the cohabitation. *Clague v. Clague*, 49 N. W. Rep. 198; *Williamson v. Williamson*, 1 Johns. Ch. 488; *Wood v. Wood*, 2 Paige 108; *Burns v. Burns*, 60 Ind. 259; *Harper v. Harper*, 29 Mo. 301, 5 Am. & Eng. Enc. L. 282. The evidence shows that all condonation and forgiveness by defendant was conditional only, the plaintiff having failed to take advantage of it, and mend his ways; but, on the contrary, kept going from bad to worse, any condonation that plaintiff might otherwise have taken advantage of has been waived or revoked. *Inskeep v. Inskeep*, 5 Ia. 204; *Names v. Names*, 25 N. W. Rep. 671.

Ledru Guthrie and *B. D. Townsend*, for respondent.

The cruelty imputed to the defendant is great irritability of temper producing ungovernable passion. Courts, in such cases, interfere with the divorce decree, not for the purpose of punishment for the wrong inflicted, but to place the person in a condition of security for the future. 1 Bish. M., D. & Sep. § 1536; *Morris v. Morris*, 14 Cal. 76, 73 Am. Dec. 615; *Wand v. Wand*, 14 Cal. 512. The acts of adultery charged were condoned by the defendant and are therefore not available in recrimination. 2 Bish M., D. & Sep. § 405; *Jones v. Jones*, 3 C. E. Greene, 30, 90 Am. Dec. 607. After intercourse and cohabitation condonation is presumed and implied. 1 Bish. M., D. & Sep. 273 and note; *Doe v. Doe*, 52 Hun. 405; § 2748, Rev. Codes. If defendant desired to avail herself of the defense of recrimination, she should have plead it. *Smith v. Smith*, 4 Paige 432; 27 Am. Dec. 75; *Pastoret v. Pastoret*, 6 Mass. 276, 30 Am. Dec. 607. The conduct of appellant was calculated to excite such mental suffering as to render respondent's condition intolerable and furnished cause for divorce. *Rice v. Rice*, 6 Ind. 100; *Goodrich v. Goodrich*, 44 Ala. 670; *Farnham v. Farnham*, 73 Ill. 467; *Gibbs v. Gibbs*, 18 Kan. 419; *Briggs v. Briggs*, 20 Mich. 34; *Freeman v. Freeman*, 30 Wis. 235.

WALLIN, J. The plaintiff by this action is seeking a total divorce from the bonds of matrimony. The trial court found in favor of the plaintiff, and entered judgment divorcing the parties, and decreeing the custody of their only child, a daughter, to the defendant. The grounds of the action, as stated in the complaint, are extreme cruelty and desertion, but there is no claim that such extreme cruelty consisted of any bodily violence either done or threat-

ened by the defendant, nor that the desertion charged against the defendant consisted of an actual quitting of plaintiff's place of abode by the defendant. The only desertion claimed (and this claim is abandoned in this court) is that the plaintiff, to secure immunity from quarrels alleged to have been fomented by the fault of the defendant, was obliged to leave his home, and that he did leave under such circumstances as would make the defendant guilty of constructive desertion under the provisions of subdivision 3, § 2740, Rev. Codes 1895. Defendant appeals from the judgment, and demands a trial anew in this court of the entire case.

The parties were married at St. Paul, Minn., in the month of June, 1889, and lived together in that city until their separation. Plaintiff charges that the defendant deserted him, in the manner above stated, on the 12th day of November, 1896, but it appears by the undisputed testimony, and it is a conceded fact, that the parties cohabited together in the month of August and in November in said City of St. Paul, in the year 1897. The particular acts of cruelty, as charged in the complaint, consists of frequent and violent quarrels and petty annoyances caused by the defendant, and extending over a period of at least six years. It is charged that such annoyances and quarrels were chiefly caused by a groundless dislike and bitter prejudice cherished on defendant's part against the mother and sister of the plaintiff. Another charge in the complaint is that the defendant unreasonably and without sufficient cause often refused plaintiff marital rights, and further that defendant falsely accused the plaintiff of conjugal infidelity, and falsely and maliciously preferred a charge of adultery against the plaintiff, and thereby maliciously and cruelly caused his arrest. To these charges the defendant answered, denying them broadly and in detail. The defendant also alleges that on the 14th, 15th, and 16th days of August, and on the 16th day of November, 1897, she cohabited and had matrimonial intercourse with the plaintiff. This intercourse is conceded by the plaintiff, and is now relied upon on both sides as constituting condonation of any and all matrimonial offenses as charged respectively in the complaint and answer and occurring prior to November 16, 1897. Defendant, by her answer, as a further defense to the cause of action alleged in the complaint and by way of recrimination charges the plaintiff with acts of marital infidelity committed with three other women, viz: with one C. W., a woman of ill fame, in the month of October, 1893, and in this connection the defendant charges that plaintiff contracted gonorrhea as a result of said intercourse, and subsequently communicated said disease to the defendant, and that the defendant experienced great suffering as a consequence of contracting said disease from her husband, and that as a result of such disease the defendant was obliged to undergo a painful surgical operation. Defendant further charges that plaintiff had sexual intercourse with a housemaid in defendant's employ in the month of May, 1896. By way of further recrimination defendant expressly charges that the

plaintiff formed a criminal intimacy with one Miss C. R. in the month of March, 1895, and that such intimacy has continued ever since; that plaintiff had sexual intercourse with said C. R. in March, 1895, at said City of St. Paul, and that said unlawful intercourse was continued, and was had in 1895 and 1896, in said city, and at certain places, as stated in the answer. The answer further charges that said adulterous intercourse between plaintiff and C. R. occurred at Great Falls, Mont., and at the Helena Hotel, in the City of Helena, Mont., in the fall of 1896, and that said illicit intercourse continued and took place on or about the 7th of December, 1896, at the St. James Hotel, in Minneapolis, Minn., and that plaintiff and Miss R. were registered at that hotel as man and wife, and occupied a room there as man and wife; that later, and at St. Paul, Minn., said adulterous relation continued in the summer and autumn of 1897, and as late as the 21st day of November, 1897. Turning now to the testimony bearing upon the plaintiff's alleged cause of action, extreme cruelty, we are constrained to say that after repeated perusals of the testimony, and upon mature deliberation thereon, we are unable to agree with the learned trial court in its finding that the defendant had been guilty of that degree of cruelty which, under the statute, would entitle the plaintiff to a divorce from the bonds of matrimony. The evidence of the parties touching the alleged extreme cruelty embraces about all the testimony given by witnesses who are in a position to speak definitely as to facts within their own personal knowledge and observation, and the evidence of the respective parties is in direct conflict. We nevertheless think that we are warranted in saying upon the record that the plaintiff, in his testimony, has very much colored and exaggerated many of the quarrels and matrimonial troubles about which he has testified, and upon which he relies, and that the troubles and dissensions which no doubt at times arose between these parties were by no means as frequent or as aggravated in character as they would appear to be in the light of the plaintiff's testimony when considered apart from the testimony of the defendant. But, inasmuch as we have concluded to place our decision of the case chiefly upon another and wholly independent ground, we shall dismiss this feature of the case with the single observation that, in our judgment, the plaintiff has failed to sustain his charge of extreme cruelty by any preponderance of evidence.

Turning to the defendant's case, we will first notice the fact, as has been seen, that the defendant, by way of recrimination, and as against the plaintiff's cause of action, has alleged in her answer that the plaintiff has since said marriage been guilty of repeated acts of marital infidelity, and expressly charges that such acts were committed with three different women, who are named in the answer, and committed at times and places as set out in the answer. We shall find it necessary to refer to but two of these charges, both of which, in our opinion, are sustained. Defendant alleges "that in the month of October, 1893, plaintiff cohabited with one Cara Weise,

a woman of ill fame, and thereby contracted gonorrhea, and communicated the same to the defendant." The plaintiff, in his testimony, denies this charge; but upon the record we shall hold that the same was sustained by a preponderance of proof. Defendant has testified that she contracted gonorrhea by having intercourse with her husband, and no charge or insinuation is made against defendant's reputation for chastity. In support of her testimony the defendant called a reputable physician, whose professional standing is conceded, and his testimony is explicit to the point that the defendant was afflicted with gonorrhea, and that he treated defendant for some time for that disorder. To this is added the testimony of the defendant to the effect that the plaintiff confessed to defendant and admitted sexual intercourse with said woman of ill fame. In our judgment, this convincing evidence has not been overcome by the plaintiff's denial. As already shown, the answer accuses plaintiff by way of recrimination with acts of illicit intercourse with one R., and charges that this illicit intercourse and relation was kept up from its inception in March, 1895, and during the years 1896 and 1897. In our judgment, the testimony in this record, despite the repeated but bald denials of the plaintiff as made in his testimony, is replete with proofs of the truth of the charge last above mentioned. The evidence sustaining this accusation does not rest alone upon the testimony of the defendant, nor upon plaintiff's confessions by word of mouth to defendant, which the defendant swears the plaintiff made with many tears, and with much outward evidence of penitence and mental distress on plaintiff's part. To such evidence, which we think is true, there must be added corroborating testimony, both direct and circumstantial, and which is both oral and written. To our minds this evidence, in its cumulative weight, leaves no room for doubt that the charge under consideration is true in substance and in fact. Without detailing this evidence, we will say that this charge of plaintiff's infidelity to marriage vows is sustained, first, by the testimony of the defendant, who states that this matter was often talked over between husband and wife, and that in such talks the plaintiff freely confessed his illicit relations with R., and that plaintiff's first admission of the fact occurred as early as September, 1896, and that very soon after said date the plaintiff attempted suicide by shooting himself with a pistol, or at least that he so stated to his wife in explanation of the fact of having a flesh wound in his side. It is further true, however, that plaintiff had previously said that the wound was occasioned accidentally in removing plaintiff's revolver from his pocket. Defendant also testified that plaintiff told her in October, 1896, that R. was about to go to Montana. Defendant further swears that after learning of plaintiff's said liaison the defendant had an interview with said R., and the matter of her relations with plaintiff was talked over between defendant and R., and that at such interview R. turned over to defendant a diamond ring, and that the defendant kept the ring until her husband asked for it, and she then, to avoid a quarrel, gave the ring to him. De-

fendant testifies that when the plaintiff made said confessions to her that he was not angry nor unkind, but seemed to feel badly or sorry over the matter. The following letters, written by the plaintiff to his wife, were put in evidence by defendant in support of her charges against her husband now under consideration:

"Louie: I am going to take a car for Minneapolis now, and shall stay over there until next week some time. It is no use Louie. I cannot try any longer. I am a hypocrite every minute I am home, and I can't do it, and shall not try. If we can't fix it between us here all right, after a few weeks I shall go West. Am so sorry to cause you pain and sorrow, but I just can't help it. John."

"Wednesday, Nov. 11, '96. Louie: I drink too much, stay out nights too much, and feel too bad, and I can't do it any longer. Have written to her to come back. If she don't I shall go out West to her next week. I must have her one way or the other, or I could not stick it out a week longer. Brace up, and get well, and try and be contented and happy. The Lord knows I wish it, but I can't stay and try to help you at the expense of my own life; and I don't believe I can be of any help to you the way I am. If I go West next week, will stay until it is fixed between us, and I feel sure you will arrange it when you feel better, and think it all over. In the meantime you will be provided for and made comfortable, and you always will be. As things stand, I can't stay home until I decide about going West. I cannot see you, or talk to you. I feel sorry for you, for her, and for myself, and between the conflicting emotions I can't stand it. It surely would be too much for me very soon, and would result disastrously, I fear. I feel much better alone, and then know I am at least true to one. I cannot be to two. It is she or something much worse for us all, and you surely cannot wish that. Brace up, Louie, and bear it. Either you or I must conclude to suffer for the sake of the other, and I have tried and failed. Now you must try, and see if you cannot let me go, for my sake. You surely do not wish to punish me, and you can do much for me by releasing me. Otherwise I must go, and everything will be wrong for all of us. But I must do it, if there is no other way, in protection to myself. Do not send for me. I cannot bear to see you feel bad, and will not come back again. I cannot do it, so do not ask. It is better for me to stay away now than to wait until she comes, or until I go, for we both would be perfectly miserable the next week. Send my things down this afternoon, so I won't have to buy new ones. Good-bye. John."

"Helena, Montana, Nov. 17, 1896. Louie: Got your telegram, and waited at Great Falls for your letter, as did 'Cis' for one for her. We had our plans all arranged, and the letters did not change them. I came to Helena last night, and leave for the coast tonight. Don't know where I will stop next, or how long I will stay, so don't write again, as a letter would not catch me. Am having a nice trip and a good time. You were entirely wrong in your surmise as to Celia. She is all right, and always was. I don't like

at all the way you wrote her. You said many things you should not, and it don't do any good. Neither did it do any good to write me about her. I told you in the last letter I wrote how I wanted it, and how it must be, and so it must be. I may come home after a time, but if I do I don't want to be molested in any way, or should immediately jump out again, and then I would stay away. You wrong Celia greatly for blaming her for anything I do. She is not to blame in the least for anything I have done. It is entirely my own doings, and I alone am to blame for it. Can't you see that by your interference you are only making matters worse? You will not be satisfied until you drive me out of the country entirely. When you do that, am sure you will find yourself far from satisfied, and we all will get the worst of it. I am not only willing, but anxious, to get back to my business, and help John; but when I go back to stay I want 'Cis' with me, or I could not stay, as I told you before. I need my business to get along with, and have a great deal involved there, but not so much as to allow it to stand in the way of my future. I can do well and get on finely anywhere out here. You say a good deal lately about the poorhouse, not only to me but to others. You know that you will always be cared for."

"St. Paul, Minn., Nov. 25, 1896. Louie: I got back this morning all right. Left her on the coast in Washington. Don't know just where she will stop, as she was going the last I saw of her; but I will hear soon. Don't bother me, as I can't come back, and don't want to be interfered with if I am going to stay here. Was going to send you some money today, but John said he sent you \$50, and I guess you have some yet. If you run short during the week, let me know. John."

The following letter was received by the defendant the first week in December, 1896: "Friday, p. m. Louie: Got home this afternoon, but can't come up to-night. There is no earthly use in my trying to do it, and I have made other arrangements definitely. My peace of mind, rest, sleep, and ability to attend to work compel me. We worry each other, and both will be better off alone, if you would only look at it reasonably. Please don't write me letters, or to mother either. They only worry us, and will do no good, as I shall not try again. Please send all my things to me,—shaving set, violin, and clothes. Will send up for them Saturday or Monday, if you will have them ready. Will send you money in day or two, and will keep you supplied regularly. Think you had better go East when you get better, as I very much hope you will soon. John."

One other letter was put in evidence. It reads as follows: "Minneapolis, Minn., Feb. 8, 1897. Louie: Was over yesterday for supper, and intended going to see you, but it was after 8 before I got started, and it was then too late. Have opened a small office here, and will see what turns up this spring. I took the old hand type and material, so the office did not cost anything. I send you check for \$10. I have sent you over \$15 for 2 months, and paid the

rent and many bills besides. Why will you tell around town that I am not caring for you or paying the rent. I am getting about tired of your making trouble for me. You will have to stop it, or you will be sorry. What did you go to Celia's folks for with a lot of truck, and make me trouble? I will not stand it, and shall take steps to stop it immediately if I hear any more of it. It don't do you any good at all, and will do you a great deal of harm if you don't quit it. I intend to see you soon, and come to some sort of an agreement with you, although I think you might either save me the trouble of doing it, or at least let me alone. You made me considerable trouble last week, and it must be stopped if you want me to stay here, and take care of you. John."

It appears by the testimony offered by the defendant that said C. R. left Minnesota in the fall of 1896, and that plaintiff, soon after her departure, went West also, and visited, among other places, Great Falls and Helena, Mont. He was seen and recognized at Helena on the 17th day of November, 1896, and the register of the Helena Hotel on that day contained the following entry in plaintiff's handwriting, "J. A. Gardner and wife." It is further shown that later in the fall of 1896 both the plaintiff and C. R. had returned to Minnesota, and that the register of the St. James Hotel, Minneapolis, Minn., on "Sunday, December 6, 1896," contained the following entry, "Albert Gardner and wife, Mpls," which entry was also in plaintiff's hand writing. It further appears that plaintiff's wife, this defendant, was not with plaintiff on the dates stated, and did not stop at either of said hotels with plaintiff. The plaintiff had an opportunity to combat this evidence while on the stand as a witness in his own behalf in rebuttal. He did not do so, despite the fact that he was in a position to deny his said registration at said hotels at the times mentioned, if the same could truthfully have been denied. To our minds, a very strong presumption arises from the plaintiff's silence that the testimony on this feature of the case is true. That it is, in connection with the other evidence, very damaging, is evident without further comment. In lieu of any such denial, the plaintiff is content to testify in general terms that he was never criminally intimate with C. R. at said hotels or elsewhere. There is other evidence in the record, to which we have not alluded, pointing strongly to the fact that the plaintiff in 1896 and 1897 was sustaining illicit relations with said C. R., and that for a part of this time the plaintiff absented himself from his wife and home in order to keep up this liaison without let or hindrance on account of his domestic ties. To our mind, the fact of this criminal intercourse with C. R. is conclusively established from various and independent sources of evidence, and we are at a loss to understand on what theory the learned trial court could have reached an opposite conclusion. There is, in our opinion, abundant testimony to sustain the charge under consideration aside from the explicit and positive evidence of the plaintiff's own oft-repeated confessions, as testified to by the defendant. Just here

we deem it proper to observe that, in our judgment, the record will compel this court to give the greater weight to the testimony of the defendant wherever the same is found to be in conflict with plaintiff's testimony. We think the evidence in this record fully impeaches and destroys the testimony of the plaintiff upon every feature of the case wherein plaintiff's own testimony is uncorroborated.

But, as we have seen, the parties to this action voluntarily cohabited with each other as man and wife in August, 1897, and likewise as late as on November 16, 1897. Defendant's counsel contend that such cohabitation operates in law as a condonation by the plaintiff of all causes of action on account of extreme cruelty existing prior to such voluntary cohabitation; but under the evidence, when considered with reference to the statute governing the subject of condonation, this point is not clearly with defendant, and we will therefore pass it over, as the same is unnecessary, in our judgment, to a proper decision of the case. But, on the other hand, it is strenuously contended by counsel for the plaintiff that the causes of action against the plaintiff pleaded by defendant in recrimination were fully condoned by defendant and wiped out as causes of action by said voluntary cohabitation between the parties, and consequently that such causes of action are not a bar to plaintiff's alleged cause of action. As has been shown, this point, however ruled, would not prevent a reversal in this case upon the ground that plaintiff has failed to sustain the charge of extreme cruelty by a preponderance of testimony. But we are decidedly of the opinion that the plaintiff is not in a position to avail himself of the alleged condonation of the causes of action against the plaintiff which are set out in the answer by way of recrimination, and which, in our opinion, have been amply sustained by the evidence in the case. Under the statute (section 2749, Rev. Codes 1895, which voices the judicial decisions on the point) there is annexed to every condonation a vital condition subsequent. The statute declares that "condonation implies a condition subsequent that the forgiving party must be treated with conjugal kindness." The evidence in this record irresistibly leads this court to the conclusion that since the date of the said condonation in August, 1897, and on November 16, 1897, the forgiving party, the deeply injured and betrayed wife, has not been treated with conjugal kindness by her husband, the guilty party. The record compels an opposite conclusion, viz: that since the date of such condonation the defendant has been subjected to the greatest possible conjugal unkindness.

This brings us to the evidence bearing upon the matter of the arrest of the plaintiff and said C. R., which took place after midnight, at St. Paul, on the 22d day of November, 1897, and under which the parties were taken by the police to the police station, and there kept over Sunday, and until the next day, when the two were bailed out. The case against the parties arrested after several continuances was dismissed, and never came to a trial on its merits.

This arrest is claimed by the plaintiff's counsel to be a new and independent ground of action, which alone entitles plaintiff to a divorce on the ground of extreme cruelty. This position rests upon two assumptions of fact: First, that the defendant did cause the arrest; and, second, that in doing so the defendant made a false charge against the plaintiff, or at least that the charge was made without reasonable cause. As to whether defendant caused the arrest indirectly by her information, or whether the police acted upon their own responsibility after getting such information, there is some conflict in the testimony; but the evidence was undisputed that the defendant did not at any time swear to or sign any complaint or accusation against the parties in the matter. The parties were arrested without warrant, which arrest was, of course, entirely legal and proper, if, as a matter of fact, the two parties arrested were, when arrested, in the commission of a criminal offense. It is conceded that at the time the police entered the room occupied by C. R. she was undressed, and in bed, and that the door of her room was opened on demand of the police by the plaintiff, who was then and there undressed, and in his night robe. This arrest was made at a boarding house where plaintiff and C. R. had adjoining rooms, and plaintiff himself testified that he had acted for C. R. in securing for her accommodations in that house. The testimony of both officers who participated in the arrest establish the facts connected with such arrest to our satisfaction, and their evidence shows that the parties, when arrested, were in *flagrante delicto*. It further appears by defendant's testimony that she saw the parties who were arrested in one of the two adjoining rooms on two different occasions when she was passing the house upon the street on which the boarding house fronted. Defendant admits and testified that she gave information to the police as to the whereabouts of the parties arrested, but denies that she made any complaint, or otherwise caused the arrest. At the time of the arrest it appears that the defendant and plaintiff's mother, who had long been estranged on account of family differences, were then living together upon amicable terms, and both mother and wife were then zealously co-operating in their efforts to reclaim the plaintiff from his evil courses, and to recall him to his home and duty. The information furnished the police was one measure taken in pursuance of this meritorious endeavor. Concerning this arrest, defendant testified: "My object in notifying the police was to have the police identify the intimacy, and recall my husband, if possible." She was greatly importuned by the authorities, as appears, to prosecute the case against the plaintiff and his paramour, but was firm in her refusal to do so; and without her co-operation the case was necessarily dropped for technical reasons. Had she been revengeful in her feelings towards plaintiff, she certainly would have not neglected so good an opportunity to gratify such revengeful feeling. But the entire evidence shows that the defendant has manifested a forgiving spirit. She wants no divorce, and asks for none. Her very last words upon the stand are

these: "I entertained a spirit of forgiveness towards Mr. Gardner, and I do yet." "I would live with him now." The condonation in question is, in our judgment, unavailing to the plaintiff. It has not been followed by conjugal kindness on the part of the guilty party, the plaintiff. After the marital intercourse between the parties to the action now relied upon as condonation had occurred, we find the plaintiff committing the gravest of offenses against his wife, and thereby fully justifying a withdrawal of such condonation.

We should have stated, in another connection, that the plaintiff admitted on the stand that he wrote the letters to his wife which are set out in this opinion, and attempts to do away with their effect as confessions of gross infidelity to his wife by saying, in effect, that they were written only to induce his wife to apply for a divorce, which he was anxious to have his wife obtain, and had never been able to induce her to apply for. We will only say that this court cannot accept this version of these letters as their only explanation. The letters, in their statements of fact, tally with all the rest of the testimony bearing upon the liaison between the plaintiff and C. R., and, while they might furnish evidence upon which defendant could procure a divorce, had she seen fit to seek divorcement, they also tell of guilt in fact, and their statements appear to us to be mainly true in their substantial features and in their essential details of fact. In concluding this branch of the case we wish to remark that, while this record discloses a most deplorable state of marital infelicity and infidelity, yet this court cannot for a moment entertain the suggestion of counsel that such reasons should influence a court in favor of granting a divorce. We cannot place a premium upon marital offenses. It may be that in a given case the real interests of the parties or the welfare of society would be subserved were the parties legally separated. But courts rest under the most solemn obligation to apply the law as it exists to the facts of each case. A divorce may be granted only upon statutory grounds, and where such grounds exist a divorce may not be denied. A court must not be influenced by any general views concerning the welfare or interests of the parties or of society.

One further matter remains for brief consideration. In this court a motion was made in behalf of the respondent to strike the statement of the case, which was allowed and settled by the District Court, from the record and files in this court. The motion is based upon the ground that such statement was not settled in the court below within the period allowed by statute for that purpose; that the time for such settlement had not been extended by the trial court, and that appellant had never excused her default in the matter of time in obtaining a settlement of the statement in this action. We have considered the affidavits and counter affidavits filed here and submitted to the trial court upon the matter of extending time and settling the statement of the case, and our conclusion is that time was extended and the statement settled upon substantial grounds and upon due cause shown therefor. In pro-

ceedings looking to a new trial or an appeal to this court the matter of extending time after the statutory periods have run is, by the terms of the statute, expressly committed, where cause is attempted to be shown, to the sound judicial discretion of the trial court. Section 5477, Rev. Codes. This statute is remedial, and as such should be liberally construed in favor of the discretion vested in the trial court. *Johnson v. Railroad Co.*, 1 N. D. 354, 48 N. W. Rep. 227. It is further true that where an issue upon the question is made in the court below, and it appears that no cause is in fact shown, and that time is extended against objection, the discretion of the court will be reviewed, and set aside in this court. To extend time in such cases against objection, and in the absence of cause shown, is an abuse of discretion. See *McGillycuddy v. Morris* (S. D.) 65 N. W. Rep. 15, citing *Moe v. Railroad Co.*, 2 N. D. 282, 50 N. W. Rep. 715. The motion to strike out the statement is therefore denied. Our conclusion is that the judgment entered in the trial court must be reversed, and that court is directed to reverse such judgment, and enter a judgment dismissing the action, with costs of both courts in favor of the defendant. All the judges concurring. (82 N. W. Rep. 872.)

C. E. SEARL vs. MICHAEL SHANKS.

Opinion filed May 4, 1900.

Justice of the Peace—Service Within County—Special Appearance—Dismissal.

In an action commenced in a Justice's Court in the County of Cass, to recover money only, the summons in the action proper was served upon the defendant in the County of Traill. Defendant, appearing specially, moved in the Justice's Court, upon the return day, to dismiss the action for want of jurisdiction over the person of the defendant, and the motion was granted. *Held*, that the action was properly dismissed, inasmuch as the action was not one in which service of a summons could be made outside of the county of the justice.

Garnishment Does Not Modify the Rule as to Service Within County Where Summons Issued.

Held, further, that there is nothing in the garnishment statute, as found in Rev. Codes 1895, §§ 5382-5402, or in chapter 82, Laws 1897, repealing or modifying the provisions of sections 6640, 6641, Rev. Codes 1895, which sections regulate the service of a summons upon the defendant in an action proper instituted in Justice's Court.

No Second Summons in Garnishment Case.

Held, further, that there is no provision of law which authorizes a justice of the peace in an ordinary action to issue a second summons in a case where the first summons fails to be served in time, nor does the right to do so exist in a case where a garnishment action has been instituted as ancillary to an ordinary action in Justice's Court. The right to apply for a second summons in attachment cases in Justice's Court is limited by the terms of the statute which grants the right.

Appeal from District Court, Cass County; *Pollock, J.*
Action by C. E. Searl against Michael Shanks. The Bank of Grandin was garnished. Judgment for defendants, and plaintiff appeals.

Affirmed.

Smith Stimmel, for appellant.

Wm. J. Clapp, for respondent.

WALLIN, J. From the record transmitted to this court we gather the following facts: The action originated in a City Justice's Court at the city of Fargo, in the County of Cass, on the 9th day of August, 1899. On that day said city justice of the peace issued a summons in the action proper, and, upon affidavit therefor first duly filed, likewise issued a garnishee summons against said garnishee. The return day named in both summonses was August 19, 1899. Both of the summonses, with said affidavit, were placed in the hands of Charles E. Wilson, Esq., for service; said Wilson then being the sheriff of Cass county. The return indorsed on the original papers, and filed with the justice before the return day, shows that each and all of said papers were served or attempted to be served by said Wilson on the 10th day of August, 1899. The return indorsed on the garnishee summons shows that the sheriff, acting officially, served the garnishee summons and said affidavit upon said garnishee within the County of Cass. It also appears by an affidavit made by said Wilson, and filed with the justice, that he served said affidavit and garnishee summons upon the defendant in the action, and that such service was made in the County of Traill, N. D. A further affidavit shows that said Charles E. Wilson served the summons in the action proper upon said defendant, Michael Shanks, in the County of Traill. Upon the return day the defendant's counsel, having appeared specially for the purpose, moved in defendant's behalf that the action proper be dismissed for the reason that service of process had not been made upon the defendant, and hence that the court had never acquired jurisdiction over the person of the defendant. Pending a decision of said motion to dismiss, counsel for plaintiff moved for the issuance of a second summons in the action proper against the defendant in said action. The city justice granted the motion to dismiss the action, and denied the motion to issue a second summons. From this judgment plaintiff appealed to the District Court upon questions of law alone, and the District Court entered judgment affirming the judgment of the city justice. Plaintiff appeals from said last-mentioned judgment to this court.

The principal question presented for our determination is whether the action proper was lawfully dismissed by the city justice. If the action proper was lawfully dismissed, the garnishment action, which is ancillary to the action proper, would fall with that action. It is likewise true that, if the motion to dismiss the action was based upon sufficient grounds, said motion was properly granted,

despite the fact that plaintiff's counsel made an effort to save the life of the action by asking the justice to issue a second summons in the same action. A second summons cannot lawfully be issued by a justice of the peace in any action after its dismissal, nor in an action which the justice is in duty bound, under the law, to dismiss upon a pending motion for dismissal. That the defendant's motion to dismiss the action was properly granted, we are entirely clear, for the reason that the attempted service of the summons in Traill county upon the defendant was abortive. The statute regulating actions commenced in Justice's Courts, in its policy as well as in its language, does not permit any such service of process to be made in cases such as this. Justices' Courts in this state, both under the constitution and the Justice's Code of the state, are courts of limited jurisdiction. Const. § 112; Rev. Codes 1895, § 6633. The jurisdiction of these courts is limited, not only with respect to the subject-matter of their jurisdiction, but with respect to the amount in controversy, and also with respect to the territory over which their jurisdiction may be exercised and their processes served. In certain classes of cases, which are particularly enumerated in subdivisions numbered 1, 2, and 4 of section 6633, *supra*, the summons, when issued by a justice of the peace, may be served in any county in the state; but the case under consideration, which is brought to recover a balance due on a board bill, does not fall under either of the subdivisions mentioned. This case manifestly falls under subdivision 3 of said section, which reads as follows: "Every other action must be tried in the county in which the defendant or one of several defendants resides or is served with summons; or in which a warrant of attachment is levied upon property of the defendant, except as provided in the next subdivision." The next subdivision declares that "an action upon a contract stipulating for payment at a particular place may be brought in the county in which such place is situated." Whether the action was or was not instituted in the proper county is a point which has been broached by counsel, but the record does not permit a decisive answer to this question. We are not advised whether the defendant does or does not reside in Cass county, or whether he agreed to pay his board bill at any place in Cass county. We do know, however, that this action is not an attachment action, and that no property in the action has been seized by an attachment proceeding, and hence we are able to state that the venue of the action could not lawfully be laid in Cass county by reason of any levy by attachment on defendant's property in Cass county. There is no pretense of any such levy in the case. But we regard this question as of little practical importance. Whether the defendant does or does not reside in Cass—the action not being one in which defendant's property has been levied upon in Cass county by attachment—is entirely immaterial. Assuming that the locus of the action is proper, there remains the stubborn fact that no service of the summons has been lawfully made upon the defendant. The service is not bad because

it was not served by an officer acting officially, inasmuch as the statute authorizes such service to be made by any person not a party to the action. Rev. Codes 1895, § 6640. The vice of the service consists in the fact that it was attempted to be made outside of the county of the justice, in a case where the statute does not permit such service to be made, but, on the contrary, forbids any such service. See Rev. Codes 1895, § 6641. The case at bar, as has been seen, does not fall within either class of the exceptions named in the section last cited, and hence is one in which service must be made within the county of the justice by whom the summons was issued.

But appellant's counsel very earnestly contends that the statute regulating the subject of garnishment in Justice' Courts, found on page 125 of the Session Laws of 1897 (see, also, Rev. Codes 1899, § 6676a), and all pre-existing provisions of the Code which regulate the service of a summons issued by justices of the peace, have been altered and amended. Counsel contends that the act of 1897, *supra*, authorizes the service of a garnishee summons and affidavit in any county where the garnishee or the defendant may be found. Under the facts in this case, we do not find it necessary to determine whether this proposition of counsel is or is not legally tenable. The attack upon the jurisdiction of the justice over the person of the defendant is not made upon the ground that the garnishee summons was not served upon defendant in the proper county. For the purposes of this opinion, without deciding the point, it may be assumed that such service was properly made in Traill county. Upon such assumption, counsel, in his brief, uses the following language: "Can it be said that the garnishment summons and affidavit can be served upon the defendant anywhere in the state, and not the summons in the action? What would be the object of serving the defendant with garnishment summons and affidavit, if he could not at the same time be served with the summons in the action?" These queries are such as might with propriety be addressed to the legislative branch of the government, in view of the fact that it is the conceded province of legislation—unless constitutionally restricted—to determine when and where, and by whom, legal process shall be served. The courts nevertheless are bound to observe the mandates of statutes as they find them, whether the same are or are not entirely logical in all their provisions. Turning to the act of 1897, we find nothing whatever in its provisions bearing upon the matter of serving an ordinary summons in an action commenced in a Justice's Court; nor does the general statute regulating garnishment, to which the act of 1897 refers, touch upon that important subject. The original statute creating the remedy by garnishment prescribed the mode of serving a garnishment summons upon both the defendant and the garnishee, but that statute is silent as to the matter of serving the summons in the action proper. It leaves that subject untouched, and strictly relegates the same to other provisions of the Code, which deals with the matter fully and in great

detail. It therefore appears that the matter of serving a summons in an action proper is not dealt with at all, either in the original garnishment statute, or in the act of 1897. This being true, the statutes we have cited, regulating the service of a summons in Justice's Court, must control, and, tested by such statutes, the attempted service of the summons in this action was wholly unavailing.

Again, counsel contend that the justice erred in denying plaintiff's application for a second summons in the action proper. As far as we understand counsel, his contention on this point is that the remedy by garnishment is the same in its essence as that of attachment, and that, if this were an action in which an attachment had issued and been levied in Cass county upon defendant's property, the plaintiff, under the terms of the statute governing attachment proceedings in Justice's Court, would be entitled to a second summons. We regard this contention as wholly untenable. It is true that many points of resemblance may be found between these two provisional remedies, but under the Code of this state the procedure laid down is widely different, respectively, in each from that prescribed for the other. There is no pretense of an attachment proceeding or levy by attachment in this case, and hence special provisions of law found only in the remedy by attachment can have no governing force in this action, or in the ancillary action herein. Our conclusion is that the judgment of the trial court must be affirmed. All the judges concurring.

(82 N. W. Rep. 734.)

MORTIMER WEBSTER *vs.* CITY OF FARGO, *et al.*

Opinion filed May 5, 1900.

Constitutional Law—Frontage Assessment for Cost of Street Paving.

A legislative enactment which charges the entire cost of paving the streets of a city against the property abutting the paving, and in proportion to frontage, is not in contravention to the fourteenth amendment to the Federal Constitution.

Legislative Power as to Local Assessment by Municipal Corporation.

In exercising the power of local assessment, the legislature is not limited to the actual increase in value of the property assessed, resulting from the local improvement. *Rolph v. City of Fargo*, 7 N. D. 640, 76 N. W. Rep. 242, followed.

Appeal from District Court, Cass County; *Pollock*, J.

Action by Mortimer Webster against the City of Fargo and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

Newman, Spalding & Stambaugh, for appellants.

C. J. Mahnken and *J. E. Green*, for respondents.

BARTHOLOMEW, C. J. This action was brought to cancel and annul a special assessment for paving purposes in the City of Fargo.

The assessment was levied in 1896, pursuant to the statutes then in force, being article 17, chapter 28, Pol. Code 1895. The complaint affirmatively sets forth the due compliance with all the statutory requirements in making the assessment, and seeks to avoid the assessment upon the sole ground that the statute under which it was made contravenes the fourteenth amendment to the federal constitution, in that it deprives the owner of the premises of his property without due process of law, and of the equal protection of the laws, and without an opportunity to be heard as to the justice of the amount demanded. A demurrer to the complaint was sustained.

This assessment was made under section 2280, Rev. Codes 1895, which reads: "Whenever any work or improvement mentioned in the preceding section shall have been determined upon and the contract let therefor, the city engineer shall forthwith calculate the amount to be assessed for such improvement for each lot or parcel of ground abutting or bounding upon such improvement. And in estimating the assessment he shall take the entire cost of such improvement and divide the same by the number of feet fronting or abutting upon the same, and the quotient shall be the sum to be assessed per front foot so bounding or abutting, and said estimate shall be filed with the city auditor and shall be presented to the city council for its approval at the first meeting held thereafter. The city auditor shall cause said estimate of the city engineer, together with a notice of the time and place when the council will meet to approve of the same, to be published in the official newspaper of the city for at least ten days prior to the meeting of the city council to approve the same." A similar assessment under this same section, and resting in all respects upon the same basis, was before this court in *Rolph v. City of Fargo*, 7 N. D. 640, 76 N. W. Rep. 242. That assessment was resisted upon substantially the same grounds that are urged here. As the question was then new in this jurisdiction, and was of much importance, and as this court conceived the adjudications upon the point to be conflicting and somewhat uncertain, a very elaborate opinion was prepared by Chief Justice Corliss, in which the underlying principles were discussed at length, and the leading cases upon all phases of the question were cited. After the fullest consideration, we upheld the assessment. We are now asked, however, to reverse that holding for the reason that the Federal Supreme Court, in the case of *Village of Norwood v. Baker*, 172 U. S. 269, 19 Sup. Ct. Rep. 187, 43 L. Ed. 443 (decided since our decision in the *Rolph Case*), have established the broad principle that all special assessments upon the basis of frontage are in violation of the fourteenth amendment to the federal constitution, in that they may result in taking of property without due process of law. That appellant's view of that case has support in the case is shown by the fact that the decision has been thus construed in *Fay v. City of Springfield* (C. C.) 94 Fed. Rep. 409, and *Cowley v. City of Spokane* (C. C.) 99 Fed.

Rep. 840. After a careful study of the opinion in *Village of Norwood v. Baker*, we are not convinced that the court intended to enunciate the broad proposition for which appellant contends. Rather, we think that case depended entirely upon the particular statutes of the State of Ohio there considered, and that such statutes as construed by that court authorized a special assessment on the front-foot plan without any legislative determination, express or implied, that such property had been specially benefited to the extent of the special assessment or at all. As we read the opinion, the assessment was not held void because it was levied on the front-foot plan,—a special assessment by valuation would have been equally void and for the same reason,—because corresponding special benefit had been in no way ascertained or declared. We do not think the court intended to negative the proposition that a legislature has power to fix the taxing district that should be specially benefited by a designated improvement, and place the entire cost of such improvement upon such taxing district. We think that court has repeatedly held the affirmative of that proposition. In *Spencer v. Merchant*, 125 U. S. 355, 8 Sup. Ct. Rep. 926, 31 L. Ed. 767, that court said: "The legislature, in the exercise of its power of taxation, has the right to direct the whole or a part of the expense of a public improvement, such as the laying out, grading, or repairing of a street, to be assessed upon the owners of lands benefited thereby, and the determination of the territorial districts which should be taxed for a local improvement is within the province of legislative discretion." In *Williams v. Eggleston*, 170 U. S. 304, 18 Sup. Ct. Rep. 617, 42 L. Ed. 1047, the court said: "Neither can it be doubted that, if the state constitution does not prohibit, the legislature, speaking generally, may create a new taxing district, determine what territory shall belong to such district, and what property shall be considered as benefited by a proposed improvement." In *Mobile County v. Kimball*, 102 U. S. 691, 26 L. Ed. 238, the court said at page 703, 102 U. S., and page 242, 26 L. Ed.: "Here the objection urged is that it fastens upon one county the expense of an improvement for the benefit of the whole state. Assuming this to be so, it is not an objection which destroys its validity. When any public work is authorized, it rests with the legislature, unless restrained by constitutional provisions, to determine in what manner the means to defray its costs shall be raised. It may apportion the burden ratably among all the counties or other particular subdivisions of the state, or lay the greater share of the whole upon that county or portion of the state specially and immediately benefited by the expenditure." In *Bauman v. Ross*, 167 U. S. 548, 17 Sup. Ct. Rep. 966, 42 L. Ed. 270, the court said at page 589, 167 U. S., page 982, 17 Sup. Ct. Rep., and page 288, 42 L. Ed.: "But it is for the legislature and not for the judiciary, to determine whether the expense of a public improvement should be borne by the whole state, or by the district or neighborhood immediately benefitted., And again: "The legislature, in the exercise of the

right of taxation, has the authority to direct the whole, or such part as it may prescribe, of the expense of a public improvement, such as the establishing, the widening, the grading, or the repair of a street, to be assessed upon the owners of lands benefited thereby." And again: "The class of lands to be assessed for the purpose may be either determined by the legislature itself, by defining a territorial district, or by other designation; or it may be left by the legislature to the determination of commissioners, and be made to consist of such lands, and such only, as the commissioners shall decide to be benefitted." And still further: "The rule of apportionment among the parcels of land benefitted also rests within the discretion of the legislature, and may be directed to be in proportion to the position, the frontage, the area or the market value of the lands, or in proportion to the benefits as estimated by commissioners. In *Parsons v. District of Columbia*, 170 U. S. 45, 18 Sup. Ct. Rep. 521, 42 L. Ed. 943, the court sustained a specific assessment per front foot upon property abutting upon a street improvement, and quoted with approval from section 752, Dill. Mun. Corp. (4th Ed.) as follows: "Whether the expense of making such improvement shall be paid out of the general treasury, or be assessed upon the abutting property or other property specially benefitted, and, if in the latter mode, whether the assessment shall be upon all property found to be benefitted, or alone upon the abutters, according to frontage or according to the area of their lots, is, according to the present weight of authority, considered to be a question of legislative expediency." And see, also, *Irrigation District v. Bradley*, 164 U. S. 112, 17 Sup. Ct. Rep. 56, 41 L. Ed. 369; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. Ed. 616; *Walston v. Nevin*, 128 U. S. 578, 9 Sup. Ct. Rep. 192, 32 L. Ed. 544; *Shoemaker v. U. S.*, 147 U. S. 282, 13 Sup. Ct. Rep. 361, 37 L. Ed. 170; *Paulson v. Portland*, 149 U. S. 30, 13 Sup. Ct. Rep. 750, 37 L. Ed. 637; *Willard v. Presbury*, 81 U. S. 676, 20 L. Ed. 719. In all these cases, as we understand them, the power of the legislature to create special taxing districts, and to charge the cost of a local improvement, in whole or in part, upon the property in said district, either according to valuation or superficial area or frontage, has been recognized and declared. We do not believe it was the intention of the Federal Supreme Court in *Village of Norwood v. Baker* to depart from this line of decisions. It is true that in many of these cases the court speak of these special assessments as being dependent upon special benefits, and to be made according to benefits received. We endeavored in the *Rolph Case* to show that all taxation was, in theory, based upon benefits conferred, and that in theory those benefits must always equal or exceed the burden imposed. Upon no other ground can taxation be ethically defended. It matters not whether the taxation be for the general support of the government that protects person and property, or for the maintenance of the schools that furnish education, or for the construction of buildings in which the public may transact business,—alike in each case,

the theory is benefits conferred commensurate with the burdens imposed. This legislative power of general taxation for public purposes is so universally conceded that no taxpayer ever raises the question of benefits. Indeed, he cannot raise it, because the legislative authorization of the tax is a legislative determination that the tax is for the benefit of the public, and the right of the legislature to make that determination is exclusive; and, it being once established that the tax is for the benefit of the public, no individual member of that public can be heard to say that he is not benefited, or that he is not benefited as largely as any other individual having the same amount of taxable property. Of course, this power of the legislature, while plenary within the limits of the constitution, yet is not an arbitrary power. The taxation must be for a public purpose. An attempt to lay a general tax for a private purpose would be confiscation, and a court would at once defeat it. But a proper state tax is conclusively presumed to be for the benefit of every taxpayer in the state; a proper county tax is conclusively presumed to be for the benefit of every taxpayer in the county; and so for cities, townships, and school districts. In each instance the tax is presumed to be for the benefit of every taxpayer in the taxing district. Yet experience teaches us every day that this is only a theory. It is not a fact, and never can be. But it must be adhered to as a theory, and accepted as a fact, or taxation must cease. The legislature may make a mistake. It may authorize a tax for a public purpose that ultimately fails to prove a public benefit in fact. But that does not affect the legislative power.

These general principles apply to and control special taxation and special assessments. The fact that the legislature has by law fixed certain permanent taxing districts does not deprive it of the power to fix other and special taxing districts, when by legislative determination such district is to receive a special benefit. It may not tax one district for the benefit of another, any more than it might tax one county for the benefit of another, or authorize a general tax for a private purpose. But if the purpose be one that ostensibly and reasonably confers a special benefit upon a special locality, then the legislative power is plenary, within the limits of the organic law. As said by Mr. Justice Brewer in his dissenting opinion in *Village of Norwood v. Baker*: "The legislative act charging the entire cost of an improvement upon certain described property is a legislative determination that the property described constitutes the area benefited, and also that it is benefited to the extent of such cost." And this legislative determination having been reached, and the legislature having the exclusive power to make the determination, it cannot be questioned. And, the fact of special benefit to the special district being thus established, no taxpayer in that district can be heard to say that he is not benefited, or that he is not benefited as largely as any other taxpayer in the special taxing district having the same valuation, area, or frontage, as the case may be. No reason can be assigned why the taxpayer in the special

district should have any more right to raise that question than the taxpayer in the permanent district. It never can be correct to say that special assessments must be measured by special benefits, and can never exceed them. That is true in theory, but only in theory. In practice it cannot be enforced. The moment we concede that any one taxpayer has the right to the judgment upon the question of his benefits of any tribunal except the legislature or the body authorized by the legislature to decide the matter, that moment we defeat the power of the legislature to make or authorize special assessments. We adhere to our holding in *Rolph v. City of Fargo*, and the judgment in this case is affirmed. All concur.
(82 N. W. Rep. 732.)

MINNEAPOLIS AND NORTHERN ELEVATOR COMPANY *vs.* TRAILL
COUNTY.

Opinion filed May 8, 1900.

Taxation—Grain in Elevators—Constitutional Law.

Chapter 5 of the Laws of 1899, which relates to the assessment and taxation of grain in elevators, warehouses, and grain houses, does not violate section 176 of the state constitution, which requires that "laws shall be passed taxing by uniform rule all property according to its true value in money." Neither is such act obnoxious to subdivision 23 of section 69 of the constitution, which prohibits the legislature from passing local or special laws for the assessment or collection of taxes; nor to section 11 of the constitution, which requires that all laws of a general nature shall have a uniform operation,—and is a valid enactment.

Appeal from District Court, Traill County; *Pollock, J.*

Action by the Minneapolis & Northern Elevator Company against the County of Traill. Judgment for defendant, and plaintiff appeals. Affirmed.

Cochrane & Corliss, for appellant.

Chapter 5, Laws 1899, shifts the burden of collecting the taxes on grain in elevators from the party legally chargeable with the payment thereof to private citizens and corporations. The power to use the private citizen as a tax collector never extends so far as to warrant the legislature in placing him in a position where there is possibility of injury to him on account thereof. *Cooley on Taxn.* (2d Ed.) 432; *South Nashville Ry Co. v. Morrow*, 11 S. W. Rep. 348-356. The only cases where the citizen may be used as a tax collector are divisible into three classes: *First*. Where the tax is levied specifically upon a stock dividend or upon the interest on a corporate bond, and the corporation is required to withhold the amount of the tax from such dividend or such interest and pay it directly into the public treasury. In such cases the corporation cannot be injured because it is not required to advance its own

money and look to the future for reimbursement. Belonging to this class are *Height v. Ry. Co.*, 6 Wall. 15; *Com. v. Ry. Co.*, 104 Pa. St. 89-106. *Second.* Where the stock or bond itself is assessed against the owner and the corporation is required to retain out of any dividend or interest payable in the future the amount of such tax. In these cases the corporation is not required in the first instance to advance the money and look for future reimbursement, but becomes responsible for the tax only when there comes into its hands in the form of dividends or interest moneys belonging to the stockholder or bondholder. Belonging to this class are *Minot v. Ry. Co.*, 18 Wall. 206; *State v. City of Newark*, 39 N. J. L. 380; *Farmers' etc. Bank v. Hoffman*, 61 N. W. Rep. 418; *Hershire v. Bank*, 35 Ia. 272; *Maltby v. Ry. Co.*, 52 Pa. St. 140; *Delaware etc. Co. v. Com.*, 66 Pa. St. 64-69. *Third.* Where the stock is assessed against the owner, the corporation is required to advance the tax and look to the stockholder for reimbursement. Here no risk of financial loss is imposed upon a third person. The owner of stock is not merely entitled to dividends, but he is the owner of a proportionate share of the property of the corporation. (*St. Albans v. Nat. Car Co.*, 57 Vt. 68-81). Belonging to this class are *First Nat. Bank v. Kentucky*, 9 Wall. 353; *Cummings v. Bank*, 101 U. S. 153; *St. Albans v. Nat. Car Co.*, 57 Vt. 68; *City v. Lange*, 62 N. W. Rep. 158. The lien given by this statute "for the amount of the tax charged under such assessment" imposes upon the elevator company the necessity of determining in advance just what the tax will be and gives it no security for any costs, and no protection against replevin or conversion suits at the direction of the owner of the grain should it claim a lien for too much. "The burden imposed upon the elevator companies is too onerous and threatens great injustice." *South Nashville Ry. Co. v. Morrow*, 11 S. W. Rep. 348-356; *City of New Orleans v. Houston*, 119 U. S. 265, 7 Sup. Ct. Rep. 198. This law violates subdivision 23 of section 29, Constitution, which prohibits special laws for the assessment and collection of taxes. Also § 11, Constitution, which requires all laws of a general nature to have uniform operation. The legislature may classify and legislate differently for different classes, but classification must have a direct relation to the character of the legislation. *Edmonds v. Herbrandson*, 2 N. D. 270; *Vermont L. & T. Co. v. Whithed*, 2 N. D. 282; *Plummer v. Borsheim*, 80 N. W. Rep. 690. The selection of a particular class of personal property, viz: grain, and putting it in a class by itself, the excluding from that class all grain not in an elevator or warehouse, and providing an exceptional and harsh method of collecting this tax, is a purely arbitrary classification and void. *State v. Hummer*, 42 N. J. L. 439; *Edmunds v. Herbrandson*, 2 N. D. 270.

John F. Selby, for respondent.

Unless restrained by constitutional provisions the power of the

state and legislature as to the mode, form, and extent of taxation is unlimited where the subjects to which it relates are within its jurisdiction. *State Tax on Foreign Held Bonds*, 15 Wall. 319; *Eurich v. Peo.*, 79 Ill. 214; *South Nashville Ry. Co. v. Morrow*, 11 S. W. Rep. 354; 3 Pickle (Tenn.) 406. The constitution of this state does not require that property shall be assessed in the name of the owner, but that all property shall be taxed according to its value by a uniform rule, and that it shall be assessed in the county in which it is situated. §§ 176, 179, 181, Const. Legislative power exists to assess to banks the deposits of individuals. *State v. Carson City Sav. Bk.*, 30 Pac. Rep. 703; *Burke v. Bedlam*, 57 Cal. 602. It is competent to tax property in an agent's hands, to and in the name of the agent, for the purpose of subjecting all taxable property in the state to taxation. *Dalby v. Peo.* 16 N. E. Rep. 224; *Walton v. Westwood*, 73 Ill. 125; *Curtis v. Township*, 23 N. W. Rep. 175; *Spanish River L. Co. v. Bay City*, 71 N. W. Rep. 595; *Sears v. Cottrell*, 5 Mich. 251; *Hutchinson v. Board*, 23 N. W. Rep. 249; *City v. Lumber Co.*, 43 N. W. Rep. 653; *Ex parte Riddle*, 8 Heisk. 817; *Carrier v. Gordon*, 21 Ohio St. 605. The statute is not obnoxious to the constitutional provision against special legislation. It provides for the assessment of all grain "in any elevator, warehouse or grain house in this state on the first day of April." The term grain house and granary are synonymous and means a repository for grain after it is threshed. The law is uniform in its operation. *Tappan v. Bank*, 19 Wall. 505.

YOUNG, J. The only question involved in this case is the constitutionality of chapter 5 of the Laws of 1899, which relates to the assessment and taxation of grain in elevators, warehouses, and grain houses. The plaintiff, in its complaint, in substance alleges that it is a Minnesota corporation, and is duly authorized to do business in this state, and as a public warehouse man; that both prior and subsequent to April 1, 1899, it owned and operated a grain elevator in the Township of Belmont, in Traill county; that on the 1st day of April, 1899, it had in its elevator in Belmont township 20,685 bushels of wheat; that such wheat was sold by plaintiff on March 7, 1899, to one G. A. Thomson, a resident of Montreal, Canada; that the said Thomson had been the owner of said wheat at all times since said purchase, and holds a warehouse receipt therefor, issued to him by plaintiff; that the plaintiff, at the time the assessment for 1899 was made, delivered to the assessor of the taxing district of Belmont a sworn statement, showing that the said G. A. Thomson, and not the plaintiff, was the owner of all of said grain; that the assessor of said district nevertheless listed and assessed all of said grain to and against the plaintiff, and so entered the same on the assessment roll of Belmont township, and the same was thereafter returned to the county auditor, and entered upon his tax list as the property of the plaintiff, and not the property of G. A. Thompson. It is also alleged that the plaintiff contested the assessment both before the township board of review and the

county board of equalization, and presented suitable proof to show that Thomson, and not plaintiff, was the owner of the grain assessed to it. The plaintiff broadly challenges the legal right of the state to assess it for this grain. It is conceded that the assessment was entirely regular in form, and that it was made in the manner required by chapter 5 of the Laws of 1899, and that the validity of such assessment turns wholly upon the constitutionality of that enactment. No question of procedure is raised by either party. A demurrer was interposed to the complaint upon the ground that it does not state facts sufficient to constitute a cause of action. This was sustained by the District Court, and plaintiff appeals from the order sustaining it.

The portions of the law under which the assessment was made to which we shall have occasion to refer read as follows: Section 1. "All grain in any elevator, warehouse or grain house in this state on the first day of April in each year shall be assessed and taxed in the name of the person, firm, company or corporation owning or operating such elevator, warehouse, or grain house on said date." Section 2. "All agents or other persons in charge of any such elevator, warehouse or grain house shall furnish the assessor under oath a statement of all grain in any such elevator, warehouse or grain house on the first day of April in each year, such statement to include the number of bushels of each and all kinds of grain on said date in any elevator, warehouse, or grain house of which he is agent, or has under his care or control, and shall further show in said statement the owner, or owners of such elevator, warehouse or grain house, or if said elevator, warehouse or grain house is not operated by the owner then the person, firm, company or corporation operating the same." Section 3. "That if the grain so assessed is not owned by the person, firm, company or corporation against whom it is assessed and taxed under the provisions of this act then such person, firm, company or corporation shall have a lien upon such grain for the amount of the tax charged under such assessment and taxation, and can hold such an amount of the grain assessed and taxed under the provisions of this act as may be necessary to pay the tax charged against such person, firm, company or corporation on the grain so assessed and taxed." It is entirely clear that the assessment required to be made by section 1, above quoted, is against the person, firm, company or corporation having the actual physical possession and control of the grain assessed, and without any reference to ownership other than that furnished by possession. The tax is assessed against the possessor, and against no one else. It is well settled that the power of the state as to the mode, form, and extent of taxation is unlimited when the subjects to which it applies are within the jurisdiction, unless restricted by constitutional provisions. *State Tax on Foreign Held Bonds Case*, 15 Wall. 319, 21 L. Ed. 179; *Cooley, Tax'n*, p. 22. The grain which the act under consideration attempts to reach is situate within the state, and is accordingly a proper subject for

taxation. The right of the legislature to impose a tax upon property so situated is unquestionable, and it may also be added that its duty to do is equally plain, for the very constitutional provision upon which the plaintiff relies provides, among other things, that all property shall be taxed. It was, then, the duty of the legislature to provide a mode for subjecting this class of property to the payment of its just share of taxation, and the determination of the methods to be employed—as to their effectiveness or expediency—is entirely a matter of legislative discretion, so long as no constitutional provision is violated. It is plaintiff's contention that the law here in question imposes taxes by a rule which is not uniform, and is, therefore, in violation of section 176 of our constitution, which provides that "laws shall be passed taxing by uniform rule all property according to its true value in money," etc. It is claimed that this law imposes a greater burden of taxation upon the owners or operators of elevators, warehouses, and grain houses than upon other persons, by compelling them to pay the taxes of others in addition to their own. It is asked, can A. be compelled to pay the tax of B.? Or, in the case at bar, can plaintiff be compelled to pay Thomson's tax? These questions which represent the substance of plaintiff's attack upon the law in question, are somewhat misleading by reason of a slight departure from the facts. There is in the supposed case an assumption that a tax is actually assessed against B., and in the present case that there is a tax assessed upon the grain in question to G. A. Thomson, which is not true. The only assessment of this grain is that made to plaintiff, and the only tax imposed is that which plaintiff is required to pay. Hence the plaintiff is not required to pay Thomson's tax, for he has none, but is asked merely to pay its own tax, assessed upon property found in its possession and control on April 1st; and the real and only question then is, has the legislature the power to adopt this mode of assessment, and assess property to the party in possession? Both under the authorities and upon principle an affirmative answer must be given to this question. Section 179 of our state constitution merely provides that all property subject to taxation shall be assessed "in the manner prescribed by law." There is no constitutional provision which makes it imperative that it be assessed against the owner. Indeed, the necessity for speedy and certain methods of producing revenue for governmental support is so great that the legislatures of many states have declined to enter into an investigation of titles for the purpose of taxation, particularly in reference to property of a shifting nature, and have, accordingly, provided for assessments against the party having the possession and control upon some specified date. Such enactments have been repeatedly before the courts, and have been uniformly upheld. Indeed, we are cited to no case which has denied the right of a state to enforce this method of assessment. A few instances are cited by way of illustration.

Section 11, chapter 15, Rev. St. Wis. 1849, provided that all kind of property of a nonresident used for manufacturing or other

business in the state might be assessed and taxed to the person having it in his possession. Such an assessment came in question in *Palmer v. Corwith*, 3 Pin. 267, and was upheld. In *City of Merrill v. Lumber Co.*, 75 Wis. 142, 43 N. W. Rep. 653, the defendant was assessed and taxed for logs owned by a nonresident, but in defendant's charge and control as agent. This was under a later law. In that case the tax was also upheld and enforced, the court, in the course of its opinion, using this language: "The property is assessed to the person in possession, whether he be the owner or holds it as agent or in some other representative capacity mentioned. If the defendant had in charge, or was in possession of, the logs as occupant or agent, they were lawfully assessed to it, the same as though it were the absolute owner."

In *Walton v. Westwood*, 73 Ill. 125, a tax was assessed to the plaintiff upon certain grain in his possession and under his control, but not owned by him, under Rev. St. 1874, authorizing such assessment. His right to restrain the collection of the tax so levied upon the ground that it was "unauthorized by law, wholly illegal, and absolutely void, and a fraud upon his rights," was denied; the court saying: "The grain had been raised in this state, purchased and paid for, and was in a warehouse in this state, held and controlled by a taxpayer of this state, on the 1st day of May, and listed by him as taxable on that day. It was not property in *transitu*,—it was not a consignment,—but was property appellant held and controlled as agent; and why should he not pay the taxes assessed against it, and where is the hardship of it, in view of section 256, which gave him a lien on the property, and which could not have been taken out of his possession by the several owners of it, until he was indemnified against the payment of the taxes? It is his own fault and negligence that he is damnified when it was in his power to have prevented it by asserting his lien." Later the same court, referring to the same statute, in *Lockwood v. Johnson*, 106 Ill. 336, said: "It was clearly the purpose of the statute to make the agent liable for the tax, else no lien would have been given the agent for his protection."

Section 817 of the Iowa Code of 1873 provides that "any person acting as the agent of another, and having in his possession or under his control or management, any money, notes, credits or personal property, belonging to such other person, with a view to investing or loaning it, or in any manner using the same for pecuniary profit, shall be required to list the same at the real value, and such agent shall be personally liable for the tax on the same." Rothrock, J., speaking for the court in *Hutchinson v. Board*, 66 Ia. 35, 23 N. W. Rep. 249, in support of a tax levied under the section quoted, and in answer to an objection that the statute in question was in conflict with article 1, § 18, of the Iowa constitution, which provides that private property shall not be taken for public use without just compensation, said: "We deem it sufficient to say, inasmuch as the property in question is protected by the laws of the state to the same extent as the property of any other

citizen, and as the rate of taxation is the same as that levied on all the citizens resident of the same taxing district, that the plaintiff's property is not appropriated to public use without compensation. It seems to us eminently just that the plaintiff, and those for whom he is acting, shall share the burdens incurred in enforcing the laws under and by virtue of which property is protected. See also, *Hutchinson v. Board*, 67 Ia. 182, 25 N. W. Rep. 121.

Cooley, in his work on Taxation (at page 373 [2d Ed.]), says: "Statutes sometimes provide that tangible personal property shall be assessed wherever in the state it may be, either to the owner himself or to the agent or person having it in charge; and there is no doubt of the right to do this whether the owner is resident of the state or not."

The case of *Com. v. Gaines*, 80 Ky. 489, has many features similar to the case at bar, and is strongly in point. Gaines had 9,297 barrels of whisky in his warehouse, owned by various persons, to whom warehouse receipts had been delivered. The whisky was taxed to Gaines, under section 7, article 1, chapter 92, Gen. St. Ky., providing that "all estate, real and personal, and all interest in such estate, named and specified in the tax book aforesaid, shall be assessed for taxation and the tax paid by the owner or possessor thereof to the person authorized by law to receive the same." The legality of the assessment to Gaines was directly in issue. On this point, the court said: "The relative rights and equities which may exist between the owner and possessor of the whisky cannot affect the power of the state to authorize its assessment to either of them, as the legislature may deem most prudent and apt to result in securing taxes therefrom. Indeed, convenience and necessity unite in support of the well-established doctrine that the taxing power may impose taxes upon persons or property, and may adopt remedies for their collection which operate against the person of the owner, or possessor, or the thing taxed, or all of them combined. And, if this were not the case, it would be easy for nonresident owners, from the proximity of the states and the commercial rights in each, through the quick transportation of this age, to escape the payment of taxation on this movable property produced by our own soil, while it received the protection of our own laws. This would be unjust; and the legislature, in declaring that the owner or possessor shall list and pay taxes on property belonging to the one, or in the hands or keeping of the other, intended to prevent it. * * * We are therefore of opinion that possessionary control of property is sufficient to authorize its assessment to the possessor or keeper of it. But this rule should not be misapplied to an absurd assessment of property which may be loaned to a neighbor for a day, or that necessarily passes through different hands in its temporary use, and which may be easily and properly assessed to the owner, who, in the absence of contract stipulating otherwise, is equitably and legally bound to pay the taxes as between himself and the possessor not coupled with an interest." Other adjudications assert the same principle.

In *People v. Lardner*, 30 Cal. 243, it was held that money belonging to litigants, in the hands of the county treasurer, was properly assessed to the treasurer by name. And in *City of San Luis Obispo v. Pettit*, 87 Cal. 499, 25 Pac. Rep. 694, an assessment to one of the litigants was held invalid. See, also, *Dalby v. People* (Ill. Sup.) 16 N. E. Rep. 224. So, too, moneys deposited in savings banks may be assessed to the banks. *People v. Badlam*, 57 Cal. 602.

The case of *Spanish River Lumber Co. v. City of Bay City* (Mich.) 71 N. W. Rep. 595, is also in point. Acts 1893, No. 206, § 14, subd. 8, provided for the assessment of personal property, including forest products, to the person having control of the premises, dock, etc. The Michigan Supreme Court in that case used this language: "If the defendant had charge or was in possession of the logs as occupant or agent, they were lawfully assessed to it, the same as though they were the real owner. No distinction need be made in the mode of assessment whether the person is such owner or only has charge of the property as agent for the owner. It is not essential that he should be the general agent to sell the property, or that he have authority to act for the owner in all matters. The statute makes possession, or the care, custody, or management of the property by another sufficient to sustain the tax, as well as the fact of ownership. This is very clear from the language used, which is definite and plain." An analogous principle is found in the internal revenue act of 1864, which made railroad companies liable to pay a tax of 5 per cent. upon dividends declared by them and upon interest installments due upon their bonds. The enforcement of a tax imposed under this act was unsuccessfully resisted in *Barnes v. Railroad Cos.*, 17 Wall. 294, 21 L. Ed. 544. In the course of its opinion, the court said: "Attempt is made to invoke that provision [referring to a particular section of the act] as showing that the tax is a tax on the shareholder, and not a tax on the railroad company; but the court is unable to perceive that the argument has any foundation whatever, as the provision does not contain a word inconsistent with the preceding part of the section, which in terms imposes the tax upon the railroad company. Beyond doubt, these two provisions should be construed together, and, when so construed, they are perfectly consistent, and show to the entire satisfaction of the court that the plaintiffs are liable to pay the tax in controversy. They are so liable because it appears that they, as such company, having been indebted for money, issued bonds or other evidences of indebtedness, payable, with interest, or with coupons representing interest, in one or more years after date, and that they declared a dividend in money due or payable to their stockholders as part of the earnings, profits, income, or gains of such company; and the section provides that such company, under such circumstances, shall be subject to and pay a tax of five per centum on the amount of all such interest or coupons, dividends or profits, and authorizes the company to deduct and withhold the amount of the tax from the dividend due or payment to their

stockholders. * * * Payment of the tax by the company is an absolute requirement, just as much as if the company was the actual holder of the bonds and the real owner of the dividends, whether they deduct and withhold the amount from the dividends or not, and the fact that the company is permitted to do so if they see fit does not in the slightest degree change the relation of the company to the United States as the taxpayers under that section of the law imposing internal revenue duties."

A statute of Kentucky providing for the taxation of shares of bank stock to the bank directly was also before the United States Supreme Court in *First Nat. Bank of Louisville v. Commonwealth of Kentucky*, 9 Wall. 353, 19 L. Ed. 701. It was contended that the shares belonged to the individual shareholders, and that the bank could not be made responsible for a tax levied on the shares, and be compelled to pay such tax to the state. Mr. Justice Miller, in pronouncing the opinion of the court sustaining the tax, used this language: "If the State of Kentucky had a claim against a stockholder of the bank, who was a nonresident of the state, it could, undoubtedly, collect the claim by legal proceedings, in which the bank could be attached or garnished, and made to pay the debt out of the means of its shareholder under its control. This is, in effect, what the law of Kentucky does in regard to the tax of the state on the bank shares. * * * The mode under consideration is the one which congress has itself adopted in collecting its tax on dividends, and on the income arising from bonds of corporations. It is the only mode which certainly and without loss secures the payment of the tax on all the shares, resident or nonresident; and, as we have already stated, is the mode which experience has justified in the New England states as the most convenient and proper in regard to the numerous wealthy corporations of those states. It is not to be readily inferred, therefore, that congress intended to prohibit this mode of collecting a tax which they expressly permitted the states to levy. See, also, *Haight v. Railroad Co.*, 6 Wall. 15, 18 L. Ed. 818. Also, *Railroad Co. v. Morrow* (Tenn. Sup.) 11 S. W. Rep. 348, 2 L. R. A. 853, and cases cited on page 353.

Since 1801 there has been a statute in force in the State of New York requiring the tax collector, in default of payment of a tax, to levy upon and sell any goods and chattels in the possession of the tax debtor. This provision has been repeatedly before the courts of that state. Its validity was expressly assumed in *Holt v. Johnson*, 14 Johns. 425; *Spencer v. McGowen*, 13 Wend. 256; *Gilbert v. Moody*, 17 Wend. 354; and impliedly in *Sheldon v. Van Buskirk*, 2 N. Y. 473, and *Railroad Co. v. Roach*, 80 N. Y. 339; and in *Hersee v. Porter*, 100 N. Y. 403, 3 N. E. Rep. 338, its constitutionality was expressly affirmed. We quote from the language by Andrews, J., in the case last cited: "It is claimed that legislative authority to seize and sell the property of A. to pay the tax of B. is not due process of law, and also that it violates the constitutional injunction that private property shall not be taken for public use

without just compensation. Const. art. 1, § 6. Confining the proposition to this bare statement, its correctness may be admitted. But the statute in question adds the additional prerequisite or condition that, to authorize the property of A. to be taken for a tax against B., the property must be in the possession of B. at the time of the taking; or, rather, the statute does not inquire whether the legal title is in A. or B., but it conclusively adjudges it to be in the person taxed for the purpose of the seizure and sale, provided it is in his possession. For the purpose of collecting the tax, the actual ownership, in contemplation of the statute, follows the actual possession. The possession under the statute is not merely a badge of ownership; it is title, so as to subject the property to seizure and sale for a tax against the possessor. * * * In view of the long-continued acquiescence by the executive, legislative, and judicial departments of the government in the legislation now in question, the court would not, we think, be justified in departing from the common understanding that the statute authority to seize any property in the possession of a person for the payment of the tax justifies the seizure and sale of the property of a third person so situated. Each individual in the community has notice of the law, and is presumed to understand that if his chattels are, by his consent or permission, in the possession of another, they can be taken for a tax against the person in possession. The law was probably framed to prevent fraud and collusion and disputes as to title, and each individual in the community may be assumed to have consented that his property shall be subject to the right of the state in this way to enforce the power of taxation. The state only receives the sum to which it is entitled. As between the owner of the property seized and the person taxed, the latter ought to have paid the tax; and we see no reason to doubt that, if the payment is enforced out of another's property in his possession, the true owner has a remedy against the person who ought to have paid it. * * * The proceeding in the case before us was an execution of a power of government in respect to taxation, and, although the right to take the plaintiff's property for the tax was not adjudged in a judicial proceeding, the act of the legislature, and the acts of the administrative officers thereunder, are, we think, due process of law within the meaning of the constitution." Substantially the same statute as that of New York was in force in Michigan from 1833 to 1858. Its constitutionality was affirmed in *Sears v. Cottrell*, 5 Mich. 250, but by a divided court, one judge dissenting. On the right of the state to act upon possession as conclusive evidence of title for the purposes of taxation, Christianity, J., concurring with the majority, said: "The public exigencies demand regular and prompt payment of taxes, and cannot brook the delays and risks of private litigation between individual claimants of the property. In the collection of taxes, therefore, this law adopts the presumption of property arising from possession,—the most obvious index of title,—and, as between the government and the possessor or other claimant, makes that presumption conclu-

sive; giving, however, to the owner or other person interested, should he turn out to be other than the possessor, his action over against the person in whose possession it was found, and for whose tax it was taken, and leaving the parties to settle the question of title and their respective rights between themselves."

The statute referred to in the two cases last cited is much more harsh than the statute we have under consideration, for it expressly authorized the taking of the property of an entire stranger to the tax, and literally required the payment of the tax of another. The tax which the plaintiff in the case at bar is required to pay is not the tax of another, but its own tax, levied upon property in its possession and under its control. That it would be so assessed and taxed it is conclusively presumed to have known, and by accepting and holding possession of the grain in its elevator on April 1st it voluntarily subjected itself to the operation of the statute which provides for the assessment of which it now complains. We are convinced that the legislature had the right to act upon the evidence of ownership afforded by possession, and for the purposes of taxation to make the presumption arising therefrom conclusive, and to provide, therefore, for the assessment and taxation of grain to the party in possession in the manner and form as provided by the act in question. This conclusion is, we think, fully established by the authorities cited. Neither, in our opinion, does the act in question violate subdivision 23, § 69 of the state constitution, which prohibits the legislature from passing local or special laws for the assessment or collection of taxes. Nor does it contravene section 11 of the constitution, which requires all laws of a general nature to have a uniform operation. The act in question clearly applies to all kinds of grain, and wherever situated within the state, whether in an elevator, a warehouse, or a grain house; and the obligation to pay taxes upon grain so situated is imposed without distinction upon all persons operating such elevators, warehouses, and grain houses, whether they be persons, firms, companies, or corporations. It is a matter of common knowledge that the various kinds of grain for the assessment and taxation of which this act provides constitute a considerable portion of the taxable property of the state; also, that grain is a kind of property altogether peculiar, in that, as a class of property, it carries with it no identification marks by which its ownership can be determined. Then, too, it is a kind of property not only impossible of identification aside from evidence of possession, but is also a kind that easily eludes the assessor, and speedily passes out of the reach of the tax collector, by consumption, or by being transported to markets outside of the state. These conditions confronting the legislature were, we think, sufficient to warrant it in providing an exclusive method for its assessment and taxation, and thereby subject it to its just share of public taxation. As to the foundation of the right of the legislature to classify, see *Trust Co. v. Whithed*, 2 N. D. 82, 49 N. W. Rep. 318; *Edmonds v. Herbrandson*, 2 N. D. 270, 50 N. W. Rep. 970, 14 L. R. A. 725; *Plummer v. Borsheim*, 8 N. D. 565, 80 N. W. Rep. 690.

Appellant urges that the lien provided by section 3 does not afford an adequate indemnity to those who are compelled to pay taxes upon grain which they in fact do not own. This we need not discuss, for, in the view we have taken, it is not a feature in the determination of the right of the state to impose the tax against the party in possession and control of the grain. Having reached the conclusion that it is within the taxing power of the state to assess and tax grain to a party in possession, the question as to whether a sufficient or any provision has been made to indemnify the taxpayer against possible loss does not affect the validity of the assessment or tax. For obvious reasons, the state cannot undertake to relieve taxpayers from the hardships which, in the nature of things, are necessarily incident to the exercise of the taxing power, and are bound to follow under any system which human ingenuity has as yet been able to devise. In New York and Michigan it appears that the party whose property has been sacrificed to pay the tax of another has only the common-law remedy against the person for whose tax it was seized. That remedy is supplemented in this state by the lien given by section 3. Whether the lien is sufficiently broad to cover all contingent losses does not touch the right of the state to impose the tax. Our conclusion is that the act in question violates no constitutional provision, and that it is a valid enactment. The order of the District Court sustaining the demurrer is accordingly affirmed. All concur.

(82 N. W. Rep. 727.)

HAMILTON L. WHITHED vs. ST. ANTHONY & DAKOTA ELEVATOR
COMPANY, *et al.*

Mortgage Foreclosure--Rights of Purchaser--Rents--Crops.

The purchaser of real estate at a mortgage foreclosure sale is entitled to receive from the tenant in possession the rents of the property sold, or the value of the use and occupation thereof, from the date of his purchase until redemption is made, under section 5549, Rev. Codes. *Held*, under the foregoing section of the statute, that where farm lands, which are being operated under a contract with the owner which reserves the title and possession of a fixed portion of the grain grown thereon in the owner, as compensation for its use, are sold at foreclosure sale, the purchaser thereof at such sale is entitled to such share as falls during such redemption period and has the same rights thereto as the owner of the land had, and may invoke the same remedies to enforce them.

Wallin, J., dissenting.

Appeal from District Court, Grand Forks County; *Fisk, J.*

Action by H. L. Whithed against the St. Anthony & Dakota Elevator Company and T. S. Edison. Judgment for defendants and plaintiff appeals.

Reversed.

Corbet & Murphy, for appellant.

The purchaser from the time of sale until redemption and a redemptioner from the time of his redemption until another redemption is entitled to receive from the tenant in possession the rents of the property sold, or the value of the use and occupation thereof. § 5549, Rev. Codes; *Clement v. Shipley*, 2 N. D. 430, 51 N. W. Rep. 414. One that holds or possesses land or tenement by any kind of title, either in fee, for life, years, or at will, may be a tenant in possession within the meaning of the statute. *Harris v. Reynolds*, 13 Cal. 515, 25 Am. & Eng. Enc. L. 895; *Walker v. McCusker*, 71 Cal. 594; *Knight v. Truett*, 18 Cal. 113; *Shores v. Scott River Co.*, 21 Cal. 135; *Walls v. Walker*, 37 Cal. 425. The statute recognizes the purchaser as the owner in equity of the land, subject only to the right of redemption, and gives him the rents and profits, or the value of the use and occupation, in short, the entire beneficial interest except the actual possession. § 5538, Rev. Codes; *Page v. Rogers*, 31 Cal. 293; *Harris v. Reynolds*, 13 Cal. 516.

O. A. Wilcox, and *Cochrane & Corliss*, for respondents.

The contract in question did not create the relation of landlord and tenant, and therefore afforded no basis for a recovery of the rent. *Bowers v. Graves*, 66 N. W. Rep. 231; *Chase v. McDonald*, 24 Ill. 236; *Altwood v. Ruckaman*, 21 Ill. 200; *Braddish v. Schneek*, 8 Johns. 151; *Caswell v. Districh*, 15 Wend. 379; *Adams v. McKesson*, 53 Pa. St. 81. The compensation for the use of land where the relation of landlord and tenant does not exist cannot be called rent. *Moulton v. Robinson*, 27 N. H. 550, 12 Am. & Eng. Enc. L. 730. The appellant in this case has no greater right to recover the crops grown on the land against the party in possession after they are severed than the owner of land would have as against a trespasser who crops the land and severs the crops. The remedy of the owner is an action for damages done to and for withholding possession of the land. *Lindsay v. Ry. Co.*, 29 Minn. 411, 43 Am. Rep. 228. The party in possession of land sold under foreclosure is not divested of his right to the standing crop until the period of redemption has expired and until the execution of the sheriff's deed. *Exeringham v. Braden*, 12 N. W. Rep. 142; *Allen v. Elderkinn*, 22 N. W. Rep. 842.

YOUNG, J. This is an action in claim and delivery brought by a purchaser of real estate at foreclosure sale to recover the possession of a quantity of wheat grown upon such land during the redemption period. The case was tried to the court without a jury, and findings of fact were made by the trial judge upon all material points. From the facts found the trial court concluded, as matter of law, that the plaintiff was not entitled to recover, and a judgment was entered dismissing the action. Plaintiff appeals from the judgment.

The appellant does not attack any of the findings of fact, but accepts them as correct. His only assignment of error is aimed at the trial court's conclusion that such facts do not warrant a recovery

by plaintiff. To make clear this point, upon which we must rule, a recital of a few facts is necessary: One Ditton was the owner of the land in question. On April 11, 1898, he entered into a written contract with one Filson, wherein the latter agreed to farm and cultivate said land at his own expense for the farming season of 1898. This contract was quite similar in its provisions to those commonly used when lands are operated upon shares. Ditton, the owner of the land, was to have one half of all grain raised, to be taken from the machine, as his share. Filson, who produced the grain, was to have the other half of it as his share, but not until all of his various covenants and agreements in the contract had been kept and performed. Until that time the title and possession of all the grain grown were to be in Ditton. The land was farmed by Filson under this contract during the year 1898. A division of the grain was made, and Filson received his share. The share belonging to the other party to the contract was set apart, and is the wheat here involved. On April 19, 1898, Ditton executed and delivered to Thomas S. Edison, one of the defendants herein, a quit-claim deed to said land, which deed was in effect a mortgage to secure an indebtedness due the latter. On April 23, 1898, the land was sold by the sheriff of Nelson county under a foreclosure of a mortgage thereon executed by Ditton in 1894 to H. L. Whithed, the plaintiff in this action, to whom the usual sheriff's certificate of sale was executed and delivered. No redemption from this sale has been made. At the time of the threshing and division of the grain Edison took possession of 1,012 bushels of wheat, which was the portion set over as rent, and caused the same to be conveyed to the defendant's elevator, where it was placed in a special bin, in his (Edison's) name. This is the grain in controversy, and was of the value of 40 cents per bushel at the commencement of this action. Possession of said grain was demanded by plaintiff prior to the commencement of this action, and refused.

It is appellant's contention that by virtue of his purchase of the land at the foreclosure sale on April 23, 1898, he came into all of the rights which either Ditton or Edison had in the contract under which the land was farmed during the redemption period, and is entitled to assert the same title and right of possession to the grain in question which they or either of them might have asserted thereunder had there been no foreclosure sale, and by the same remedies. This contention is based upon section 5549, Rev. Codes, which, in part, reads as follows: "The purchaser from the time of the sale until a redemption, and a redemptioner from the time of his redemption until another redemption is entitled to receive from the tenant in possession the rents of the property sold, or the value of the use and occupation thereof." This same statute has been in force in California for many years, during which it has been repeatedly passed upon by the Supreme Court of that state. In *Reynolds v. Lathrop*, 7 Cal. 43, it was held that the effect of the sale was equivalent to an assignment of the lease, and that the plaintiff in

that case, who was the purchaser, "could sue for the rent, as often as it fell due, under the terms of the lease existing when he became purchaser." This case was followed in *McDevitt v. Sullivan*, 8 Cal. 593, which went further, and held that when the tenant had paid the rent for the redemption period to his landlord in advance, the purchaser could require him to pay it over again. In *Harris v. Reynolds*, 13 Cal. 515, the words "tenant in possession," as used in the statute, were construed and held to include the owner who is in possession, as well as others who have possession under any kind of title. The court said: "The phrase 'the tenant in possession' is a generic term intended to designate the class of persons from whom the purchaser was to receive the rents. The language is not, when a tenant of the debtor is in possession, the tenant shall pay the purchaser, or that the debtor when in possession shall not; but the phraseology designed, evidently, to fix a general right applying to all cases of tenancy, for none are excluded. * * * The definition of 'tenant in possession' embraces within the natural and usual meaning of the words a judgment debtor as well as his lessee. The owner in fee in possession is no less, in legal contemplation, a tenant, than the man who occupies under him. The definition of 'tenant' is 'one who holds or possesses lands or tenements by any kind of title, either in fee, for life, years, or at will.'" So, too, in *Hill v. Taylor*, 22 Cal. 191, it was held that the purchaser of a mine at a mortgage foreclosure sale was entitled to the profits of the mine, which the mortgagor was working himself. That court further said, in discussing relative rights of the purchaser and original owner after sale, in *Page v. Rogers*, 31 Cal. 294: "The purchaser acquires an equitable estate in the lands, conditional, it is true, but which may become absolute by simple lapse of time, without the performance of the only condition which can defeat the purchase. The legal title remains in the judgment debtor, with the further right in him, and his creditors having subsequent liens, to defeat the operation of a sale already made during a period of six months, after which the equitable estate acquired by the purchaser becomes absolute and indefeasible, and the mere dry, naked legal title remains in the judgment debtor, with authority in the sheriff to divest it by executing a deed to the purchaser. Even during the period which elapses between the sale and expiration of the time for redemption the statute regards the purchaser as the owner in equity, and gives him the rents and profits, or the value of the use and occupation. * * * In short, it gives him the entire beneficial interest in the property, except the actual possession." Later, in *Walker v. McCusker*, 71 Cal. 594, 12 Pac. Rep. 723, it was held that "when real property is sold at a foreclosure sale a party to the foreclosure suit, who thereafter remains in possession under a claim of title, which is subject to the mortgage, is a tenant in possession, within the meaning of section 707 of the Code of Civil Procedure, and liable as such to account to the purchaser, in *assumpsit*, for the value of the use and occupation." See, also, *Kline v. Chase*,

17 Cal. 596; *Knight v. Truett*, 18 Cal. 113; *Walls v. Walker*, 37 Cal. 424; *Webster v. Cook*, 38 Cal. 423.

The same question which is now presented by the appellant was before this court in *Clement v. Shipley*, 2 N. D. 430, 51 N. W. Rep. 414, in a form not materially different. In that case the plaintiff, as a purchaser at a foreclosure sale, was seeking to collect the rents due from the lessee, during the period of redemption, to the lessor, according to the terms of the contract existing between the parties to the lease. His right to recover was upheld, following the California cases to which we have referred. The recovery in that case was money, and was the sum fixed by the contract between the lessor and lessee as stipulated compensation for the use of the property there involved. In the case at bar the compensation agreed upon for the use of the land is not money, but property, and it is the particular property involved in this suit. We do not think that this changes the principle, or militates in any way against the plaintiff's right to recover. It is true, the plaintiff does not sue to recover a money judgment for "the value of the use and occupation" for the year of redemption, and very properly does not; for, if he had brought that form of action against the parties who occupied the land, he would have been confronted by the contract between Ditton and Filson under which the farm was operated, which provides for the payment for its use in property, and in a particular manner. That contract, in the absence of fraud or collusion (and there was none) is binding upon plaintiff. He can demand no more from the tenant than could Ditton. Neither could Filson, the tenant, be required to pay for the use of the land any more or in different manner than he had stipulated to do. Further, the statutory right to rent during the redemption period does not limit the purchaser to the recovery of money rent. The word "rent" is comprehensive, and embraces "the compensation, either in money, provisions, chattels, or labor received by the owner of soil from the occupant thereof." 3 Kent, Comm. 460; 2 Steph. Comm. 23; Jac. & G. Landl. & Ten. § 38. It is not necessary to technically classify the contract under which the land in question was farmed during the period of redemption. It is sufficient for the purposes of this case that it is the contract which fixed the compensation of the owner of the land for its use, and that the compensation so fixed is the wheat here involved. Under this contract the owner of the land could at all times maintain replevin for his share, and until division was made for the entire crop. See *Angell v. Egger*, 6 N. D. 391, 71 N. W. Rep. 547. We therefore hold that the plaintiff by his purchase at the foreclosure sale was substituted to the rights which the owner of the land had in the contract under which it was operated during the period of redemption, and it is not important whether it was Ditton or Edison. That contract gave the title to and right of possession of the particular wheat here involved to Ditton. To this plaintiff succeeded by his purchase at the foreclosure sale. Having then the same rights in the contract which either Ditton or

Edison had, it would seem unnecessary to add that he is entitled to the same remedies which they might have had to protect and enforce their interests in and under this contract. Those, of course, would include the right to recover the possession of the property in the manner now being pursued by the plaintiff. Our conclusion is that the facts found entitle the plaintiff to a judgment against the defendants for a return of the wheat in question, in quantity 1,012 bushels, or for its value, which is found to be \$404.80 on October 1, 1898, in case a delivery thereof cannot be had. The judgment of the District Court is reversed, and that court is directed to enter judgment for the plaintiff upon its findings of fact.

BARTHOLOMEW, C. J. I fully concur in the opinion prepared by Justice Young. But deeming the question involved to be of great practical importance, and conceiving that much misapprehension prevails in the minds of the profession as well as the laity as to the exact condition of the law upon the question in this state, I wish, in concurring, to add a few thoughts to what my associate has said. A restatement of the facts is unnecessary. It is important, I think, to determine as nearly as may be the exact nature of the contract entered into between Ditton, the mortgagor, and the man Filson. If Filson was simply hired by Ditton to raise a crop upon the land, and was to receive as compensation for his labor in so doing a certain share of the crop produced, and if that be the entire scope of the contract, then, of course, Filson had no interest in the land. Ditton was the real party in possession during the year of redemption, and the plaintiff, the purchaser at the foreclosure sale, could recover nothing, as against him, as rent, as that word is used in the statute, because no rent had ever been agreed upon, and the owner, as tenant in possession, would be liable only for "the value of the use and occupation thereof," and the purchaser could claim title to no specific property as representing such value, and this action must fail. The result will be different if the contract made Filson the tenant in possession. I am clear that such was the intent, purpose, and effect of the contract. The form of contract used in this case is quite common in this state. It starts out by declaring: "Witnesseth, that the party of the first part (Filson) hereby agrees to and with the party of the second part (Ditton), for the consideration hereinafter named, to well and faithfully till and farm, during the season of farming in the year 1898, commencing April 1st, 1898, and ending April 1st, 1899, in a good and husbandlike manner, and according to the usual course of husbandry, the following described premises." Then follow certain details of reciprocal obligations, and the contract continues: "And, until all the covenants and agreements to be performed by the party of the first part shall have been fulfilled, the title and possession of all hay, grain, crops, produce, stock, increase, income, and products raised, grown, or produced on said premises shall be and remain in the party of the second part, and said party of the second part has the right to take and hold enough

of the crops, stock, increase, income, products, that would by the division belong to said party of the first part to repay any and all advances made to him by the party of the second part, and interest thereon at 8 per cent. per annum, and also to pay all indebtedness due said party of the second part by said party of the first part, if any there be." The evident intent of this contract was to deprive the tenant of that which under an unrestricted lease would be his, *i. e.* the title to the crops produced by himself upon the land, and to vest such title in the landlord. The object of this is two-fold: First, it secures the rent in a state where landlords' liens are unknown; and, second, it secures all advances which the landlord may make to the tenant for seed grain, supplies, hired help, etc. It is of great advantage to the landlord; and in *Angell v. Egger*, 6 N. D. 391, 71 N. W. Rep. 547, this court said that the tenant might make such a contract, and yet the instrument remain a lease, and the relations of landlord and tenant exist. If it were the intention of the parties that Filson should have the possession and use of the land, he then by the contract acquired an interest in the land; and if the amount of the crop that should ultimately belong to Ditton, irrespective of any advances or indebtedness, was so reserved as rent, then the contract was a technical lease. It is clear to me that Filson was to possess, control, and use the land. By the contract he covenants "to commit no waste or damage on said real estate, and to suffer none to be done." This latter covenant would be impossible of performance if he had not exclusive control. Again: "It is also agreed that, in case said party of the first part (Filson) fails to perform any of the conditions and terms of this contract on his part to be done and performed, then said party of the second part (Ditton) is hereby authorized and empowered to enter upon said premises and take full and absolute control of the same." This is the usual provision for re-entry by the landlord, and can have no force unless the tenant is in possession in his own right. Again: "This contract shall not be assignable or sublet by the party of the first part without the consent of the party of the second part." It could not be "sublet" by Filson unless it had previously been "let" to him. If it had been let to him, what he paid therefor was rent, and the contract is a lease, notwithstanding the fact that some of its provisions, standing alone, might import the contrary. Said the court in *Walls v. Preston*, 25 Cal. 60: "The character of the instrument must be determined upon the consideration of all its terms and provisions, and the court will give it such a construction as will carry into effect the intention of the parties, without regard to the technical terms employed. Although words are used which, if disconnected from other parts of the instrument, would import a lease, they will not be so construed if the evident intention was merely to make a cropping contract. Nor, on the other hand, will the instrument be so construed as to deprive the occupant of the position of a tenant of the land, if from the whole instrument it is

apparent that the parties intended he should enjoy the exclusive possession of the premises." See, also, *Townsend v. Isenberger*, 45 Ia. 670; *Chandler v. Thurston*, 10 Pick. 205; *Walker v. Fitts*, 24 Pick. 191. In 12 Am. & Eng. Enc. L. 977, it is said: "No particular form of expression or technical words are necessary to constitute a lease, but whatever expressions explain the intention of the parties to be that one shall divest himself of the possession of his property, and the other shall take it, for a certain space of time, are sufficient, and will amount to a lease for years, as effectually as if the most proper and permanent form of words had been made use of for that purpose." I am aware that some courts, while not holding that contracts of this character are not leases, have yet preferred to designate them as contracts of adventure. *Taylor v. Bradley*, 39 N. Y. 129; *Bowers v. Graves* (S. D.) 66 N. W. Rep. 931. But see the remarks of Woodruff, J., in *Taylor v. Bradley*, as to what would be the holding in New York were the question new there, as it is here. In all cases of leasing of realty for farming or commercial purposes, it is a contract of adventure, so far as the lessee is concerned. In this case there is the added uncertainty as to the value of what is to be paid for rent. But that always happens when the rent is payable in kind. When the cases speak of certainty as to the rent, they mean simply that the contract must determine what the rent is to be, and not its value. If to be paid in a share of the crop, the contract must determine what share. I do not think that the fact that the owner of the land was in this case to hold the title to the crop destroys the contract as a lease. Rather, to my mind, it has the opposite effect. The express provision was inserted because the parties understood that if it was not inserted the title would be in the lessee, and, as stated, it was inserted as security, and to that extent the provision is in the nature of a mortgage. But it is certain that the owner intended by the contract to dispossess himself and place the tenant in possession, and that, too, not merely for the time necessary to produce a crop, but for a year certain; and during the entire term, if the tenant performed his covenants, any interference with his possession by the owner would have been a trespass. Among the results that follow at common law if the contract be considered as a lease is the fact that a conveyance of the reversion carries with it all rents under the lease which have not already become due, and ripened into a right of action for money in the hands of the lessor. In *Wood, Landl. & Ten.* 722, it is said: "A sale of the reversion carries with it, unless expressly reserved, all rents and rights under a lease previously granted that subsequently became due, and the grantee may recover them in an action in his own name. Upon such conveyance the grantee takes the place and assumes the rights and liabilities of the original landlord. In other words, he becomes landlord as fully as though the lease had been made by himself, whether he knew all the terms of the lease or not." In *Townsend v. Isenberger*, supra,

it is said, "Rent reserved by lease, and not accrued, passes by a conveyance of land to the grantee;" citing *Abercrombie v. Redpath*, 1 Ia. 111, and *Van Driel v. Rosierz*, 26 Ia. 575. Again: "A purchaser under an execution sale is entitled to the rent accruing or falling due after the execution of the sheriff's deed;" citing *Bank v. Wise*, 3 Watts, 394; *Martin v. Martin*, 7 Md. 368. Where rent is payable at stated periods, as quarterly or yearly, it will not be apportioned, in the absence of an express reservation. The party holding the reversion when the rent falls due is entitled to the whole thereof. In *Bank v. Wise*, supra, the premises were rented for an annual rental of \$425, payable half-yearly. Fourteen days before a half year's rent became payable, the premises were sold under execution. The court said: "The idea of apportioning the rent that becomes payable after the purchaser of the reversionary interest in fee at a sheriff's sale has paid the purchase money and received his deed of conveyance for it, between him and the defendant in the execution, as whose estate it was sold, is unknown to the law, and cannot be reconciled with any of its analogous and fixed principles." And in a contest between the landlord and the purchaser the latter was allowed to recover the entire half year's rent, although he purchased the property only 14 days prior to the expiration of the half year. This case was expressly approved in *Burns v. Cooper*, 31 Pa. St. 426. This was also a case of judicial sale, where the rent was a share of the crop, and the court said: "The rent (*i. e.* one-half of the grain) was not payable until the crop should ripen and be harvested. If the reversion did not pass to Cooper until the 1st of April, 1856, it still passed before the rent became payable; and the principle is that rent is incident to the reversion until it becomes both *debitum et solvendum*. Until then it passes with the land to the heir, devisee, or purchaser, and not until then does it become personal and go to the executor. Until then it is no debt." *Dixon v. Niccolls*, 39 Ill. 372, was a case where farm lands were leased for a share of the crop, to be delivered when the crop was threshed. The farm was sold without reservation on October 1st of the year for which the farm was leased. At that time the crop was cut and stacked on the premises. It was threshed on October 24th. The court held the purchaser entitled to the entire rent. See, also, *Montague v. Gay*, 17 Mass. 439. To the several California cases cited in the main opinion as holding that the foreclosure sale operates as a conveyance to the purchaser at such sale of the entire beneficial interest of the owner, save the right of redemption, and the bare right of possession during the redemption period, the following cases may be added: *Harris v. Reynolds*, 13 Cal. 515; *Shores v. River Co.*, 21 Cal. 135; *Henry v. Exerts*, 30 Cal. 425; *Robinson v. Thornton*, 102 Cal. 680, 34 Pac. Rep. 120; *Duff v. Randall*, 48 Pac. Rep. 66.

I cite the foregoing authorities, not to establish the elementary principle that a voluntary conveyance of leased premises operates

as an assignment of the lease, and conveys to the purchaser full right to collect rent thereunder, but to show that such conveyance assigns to the purchaser the right and title to all rents not then due by the terms of the lease, however much they may be earned, and to show that the same principles apply to judicial or foreclosure sales. True, many of the cases speak of the payment of the purchase money and receipt of sheriff's deed as entitling the purchaser to the rents, but those cases were sales where no provision was made for redemption. The California cases deal with sheriff's certificates, and apply the same rule as in cases of deeds. Certainly nothing less can be insisted upon under our statute. Section 5538, Rev. Codes, declares, "Upon a sale of real property the purchaser is substituted to and acquires all the right, title, interest and claim of the judgment debtor thereto," subject, as has been said, to the debtor's right of redemption, and his bare right of possession during the redemption period. With this limitation, every right, title, interest, and claim of the debtor is sold, and passes to the purchaser, in all respects, to the same extent that it would pass by a voluntary conveyance. All title to crops that was by the lease reserved in the landlord is transferred by the sale to the purchaser, and all the rights of the landlord under his lease to enforce the payment of rent inure to the benefit of the purchaser. And upon what is the underlying principle that gives to the purchaser all rents not yet due, however much they may be earned, based? It is simply that they constitute a part of the estate that is bought and paid for. They enhance the value of the estate just as certainly as would a growing crop, and just as certainly they form a part of that for which the consideration is paid. I have not seen this more clearly stated anywhere than by Kennedy, J., in *Bank v. Wise*, 3 Watts, 397: "But then to say that the lessee, even at the expiration of the half year, shall be bound to pay the rent for the last three months thereof to the purchaser, and for the first three to the defendant in the execution, would be to split up a demand into two, which, by the terms of the contract giving rise to it, was one and entire, and would subject the lessee to two actions instead of one, contrary to his agreement, and contrary to a well-known rule of the common law. As the lessee, however, has had the full enjoyment of the leased premises, there can be no good reason for his not paying the whole of the half year's rent, as soon as it shall become payable by his lease, to the party entitled to receive it. Then, seeing the purchaser has succeeded to the rights of the landlord, why shall he not receive the whole rent? The only reason, of the least plausibility, that can be alleged for apportioning the rent according to time between the defendant in the execution and the purchaser at sheriff's sale, by giving one-half of it, on account of the first three months of the half year, to the defendant in the execution, and the other half, for the last three months, to the purchaser at sheriff's sale, would be to say that it did not properly and truly form any part of

the subject-matter or estate sold by the sheriff; that the defendant in the execution had received no consideration, and the purchaser had paid none for it. But, by inquiring into and ascertaining what was really sold and bought at the sheriff's sale, it will be seen that there is no ground whatever for such a suggestion, and that it is a great misapprehension of the matter to suppose it; for we shall find that the purchaser at sheriff's sale not only purchased, but must be considered as having paid for, and as being invested with, a right to demand and receive all the rents which shall become payable, according to the terms of the lease, after the time that his title to his purchase became perfect, by his payment of the purchase money, and receipt of the sheriff's deed. A right to demand and receive all such rents formed the very heart and essence of his purchase, seeing it was merely a reversionary interest." Nor does this work any hardship upon the execution or mortgage debtor. He gets the full benefit of this enhanced value. It goes to pay his debt, or is returned to him by way of surplus. I find nothing in our statute that conflicts with these well-settled principles. It says that the purchaser from the time of his purchase until a redemption is entitled to receive from the tenant in possession the rents. But the rents he is to recover for that time are the rents accruing during the period. The fact that in case of redemption all rents received must be credited upon the debt does not change the relative conditions. Redemption can be made only by paying the amount of the purchase price, with interest, as provided by statute; and the purchaser, being only required to credit the amount of rent actually received, would still have his original purchase price, with the interest. The application of these principles to the case at bar makes it clear that if, under the contract in question, the title to the crop remained in Ditton, by the purchase that interest was transferred to this plaintiff, and after the crop had been divided under the lease, and the one-half that was to be kept by the landlord as rent had been placed by itself, then plaintiff's title to such half, and to every part thereof, became absolute; and if then a third party, without plaintiff's knowledge or consent, conveyed it to a point where it had an increased value, and the defendants there unlawfully detained it, plaintiff might recover the grain or its value at that point. The judgment is properly reversed. I am authorized to say that Young, J., fully concurs in these views.

WALLIN, J. In this case I am compelled to dissent. I cannot concur either in a reversal of the judgment of the District Court, or in the reasoning upon which that result is accomplished. It would seem that a majority of the court are inclined to base plaintiff's right to recover chiefly upon supposed rights which the plaintiff secured as purchaser of the realty at foreclosure sale, and in this the court, in my judgment, is in error. The purchaser, as such, acquired no right either to the rents, or to the value of the use of the premises, during the redemption period. The right to recover is based wholly upon a statute which was expressly enacted to confer

a right upon purchasers which did not exist as a result of any execution or foreclosure sale of realty. Repeal this additional statute, and no action could be maintained either for the value of the use, or to recover rent, during the period of redemption. Upon this point the Supreme Court of California, in *Walker v. McCusker*, 12 Pac. Rep. 723, says: "The defendant's liability is statutory." And in *Shores v. Scott River Co.*, 21 Cal. 135, the same court, in construing this statute, declares that: "The statute only gives a remedy against the tenant in possession. The right to recover rests upon the statute, and the tenant in possession is the only person against whom the right exists." It is needless to say that, where a right of action is purely statutory, it is incumbent upon the plaintiff to bring his case within the fair import of the language of the enactment which confers the right of action. In the case at bar the plaintiff has chosen to sue for rent accruing, as plaintiff claims, within the redemption period. The statute authorizes a purchaser to receive the rent, but in suing for rent the plaintiff necessarily assumes the burden of showing that the defendant had undertaken to pay rent, or in some manner had bound himself to do so. It is not enough that plaintiff in this case shows some right of action. He sues for rent, and that alone, and he can recover upon no other theory than that of a re-entry of the premises. It is, however, one of the anomalies of this case that the defendant Edison never had anything to do with renting the premises or with raising the crop in question; nor does the plaintiff claim that Edison ever rented or cultivated the premises, or agreed to pay rent. The majority of the court have excluded any such idea by placing another person in the position of tenant and lessee, viz: Filson, who, it is conceded, raised the grain in question. Another remarkable feature of the case is that the complaint says nothing whatever about either a leasing or a renting of the premises. While the plaintiff's counsel and the court agree that the action is brought to recover rent, yet no one can gather any such idea by a perusal of the complaint or answer. Plaintiff alleges ownership of the grain, and is seeking to recover possession solely as owner. Upon his pleading the plaintiff is bound to establish title in himself, but upon the theory of the plaintiff and that of my associates the plaintiff must recover, if at all, upon the theory that the action is brought, under the statute, to recover rent. If plaintiff expects to recover upon his allegation of title, I maintain that he should show when and by what means he acquired title. From my standpoint, no title to the grain has been shown in the plaintiff. Certainly he gets no title to any grain as a result of his purchase of the realty. Nor does the statute in question give a purchaser of realty at a foreclosure sale a title to any product of the soil. The statute (section 5549) confers the right to recover of the tenant in possession either rent, or the value of the use. This right assumes and presupposes that all the products of the soil belong to the tenant in possession. This being so, the

purchaser by virtue of his purchase cannot acquire title to the products raised during the redemption period. But, if the result of the action is to be determined by an adjudication upon the question of title, then it is clear to my mind that the plaintiff should not recover. True, this court cannot upon this record enter upon a consideration of the competitive claims of ownership as between the plaintiff and Edison. No evidence has been transmitted to this court, and hence all questions of fact must be regarded as settled by the findings of the trial court. That court has found as a fact that Edison owns the grain in question. This court cannot, if it were so inclined, alter this finding. It must be admitted that the findings are somewhat obscure with respect to the time at which Edison became the owner of the grain. Nor is it made clear just how he acquired his title. It is stated that Ditton, before the foreclosure sale, gave a quitclaim deed of the premises to Edison, and that the deed was intended as a mere mortgage security. A quitclaim deed given as security, if drawn in the usual form, would not confer title to the crop, but we are not advised as to any language contained in this particular deed. Nor do we know what, if any, oral arrangement was made between the parties concerning a sale or hypothecation of the grain. The ultimate fact of Edison's ownership is, however, found, and neither party has sought in any manner to impeach this finding. The duty, therefore, of the trial court was and this court is to apply an elementary rule of law applicable to such a finding in a case where the right of possession hinges upon ownership. It is this: Ownership of personalty confers a right of possession upon the owner unless some superior right of possession is shown. In this case the issue is squarely made in the pleadings, and neither party alleges any right of possession other than that based upon his allegation of ownership.

But, turning to theories (*viz*: theories arising wholly outside the allegations of the pleadings), we first encounter the theory that Filson was a tenant for years, and that he raised the grain in question as tenant under a written lease of the premises. My Brother Bartholomew has written a concurring opinion in which the conclusion is reached that the written agreement under which Filson raised the crop is a lease, and that Filson occupied the relation of a tenant, and was bound by a lease to pay a stipulated rental for the use of the land. A very careful consideration of the same instrument has led me to an opposite conclusion. As I read the instrument, it was framed for the express and easily recognized purpose of avoiding and steering clear of creating the relation of landlord and tenant. It appears to me to be drawn with an especial view to eliminate all of the manifold advantages which at the common law accrue to a tenant for years under a lease of real estate for farming purposes. At the common law a tenant for years was the sole owner of all the products of leased premises. He could sell or incumber the crops at pleasure. But this contract strikes at the foundation of

any such claim, by declaring that title and ownership of the crop were reserved and at all times vested in the landowner. True, the landowner bound himself to pay Filson for his services in raising the crop, out of the grain raised by Filson; yet this agreement, until performed, did not operate to transfer title to Filson. Title was expressly reserved to the landowner. Under such an agreement, if the landowner had refused to turn over any of the grain to Filson, the sole remedy of the latter would be an action for damages. See *Angell v. Egger*, 6 N. D. 391, 71 N. W. Rep. 547. Claim and delivery would not lie in such a case. Again, a tenant under a lease may sublet the premises, unless expressly restricted. Nothing is said in this contract about subletting the premises, nor can such a right be gathered from the language of the instrument; but the party of the first part, Filson, is not permitted to either sublet or assign his rights and duties under the contract. The language is, "This contract shall not be assignable or sublet by the party of the first part without consent of the party of the second part." Nor can I see in the instrument any language giving any right of possession to Filson, other than such possession as would be necessary to a discharge of his obligation to raise a crop. The only language in the instrument bearing upon the question at all is as follows: Filson agrees, "for the consideration hereafter named, to well and faithfully till the farm during the season of farming in the year 1898, commencing April 1st, 1898, and ending April 1st, 1899, in a good and husbandlike manner, according to the usual course of husbandry." In this I can discover no purpose of conferring upon Filson any authority to live upon the land, or to occupy the same as a tenant for all purposes. On the contrary, to my mind the instrument, by this language, as well as the other language contained in it, shows that the landowner by deliberate purpose undertook to avoid the consequences of leasing the premises. The intent to make a contract of hiring, as distinguished from one of leasing, is, in my opinion, clearly manifested in the following paragraph of the instrument: "In consideration of the faithful and diligent performance of all the stipulations of this contract by the party of the first part (Filson), the party of the second part (Ditton) agrees, upon reasonable request thereafter made, to give and deliver on said farm the one-half of all grains, vegetables, so raised and secured upon said farm during said season." The language I have quoted therefore shows the nature and purpose of the contract. Filson agreed to raise the crop at his own expense, and Ditton agreed to compensate him by giving him one-half of the crop, the title to which was at all times in Ditton. At the common law the tenant is the party who agrees to pay a rental. But in this case the most searching examination of the contract fails to show any agreement on Filson's part to pay any rental, either in money or in grain. Filson's obligations were to produce the crop at his own expense. It is impossible to spell out of the instrument any obligation resting upon Filson

to pay rent in any manner. This being true, no action would lie, based upon the contract, in favor of Ditton, to recover any rent. Had Filson, after signing the contract, refused to sow the seed, or, after sowing the seed, refused to harvest the crop, an action for such breach of the contract would lie; but certainly no one would contend that the damages could be measured by any specific amount as rent. No rent having been promised, none could be recovered. It follows, of course, that the plaintiff, as purchaser, could not have acquired the right to sue Filson for rent, for the simple reason that the landowner (Ditton did not have any contract whereby he could himself sue for rent. By the very plain language of the instrument, the obligation to pay rested wholly upon the landowner, and upon no other person. Here, again, the relation of landlord and tenant is squarely reversed and contradicted. At the common law, under a renting contract, it is the tenant who is required to pay, and the landlord receives the pay. My conclusion upon this point is, of course, that the plaintiff cannot recover in this action. He sues for rent, and the facts show that no rent whatever was agreed to be paid.

But another point would, in my judgment, be equally fatal to the plaintiff's action. Let it be assumed, for purposes of discussion, that Filson was a tenant, and one who had bound himself to pay a rental for the premises. Upon this assumption it is conceded that Filson had paid his rent to his landlord, in full, long prior to the commencement of this action. By such payment, which was made without notice of plaintiff's rights, if rights he has, Filson was exonerated entirely. The statute of this state makes this point clear. Rev. Codes, § 3543. Now, it is very difficult to see how or upon what theory Ditton could have sued Filson for any rent after the rent had been lawfully paid to him. It would seem that, the obligation having been performed, no action could possibly lie for its non-performance in favor of any one; and yet this action, aside from the pleadings, is an action to recover rent, and can be sustained on no other basis.

But, aside from all other questions, it is transparently clear that the plaintiff has sued the wrong defendant. The wording of the statute under which the action is brought declares that the purchaser "is entitled to receive from the tenant in possession the rents of the property sold, or the value of the use and occupation thereof." This language is specific and unambiguous as to the party from whom the rents or value of the use are to be received. That party is the "tenant in possession." According to plaintiff's theory and that of my associates, Filson, and no other person, is the tenant in possession. It is, moreover, obvious that, unless Filson stands in the relation of a tenant, there is no rent in the case, and hence no action would lie to recover it. But the plaintiff has not sued Filson. This is clearly fatal. The statute is not obscure in meaning, and the plaintiff bases his rights upon the statute. Upon this feature of

the case *Shores v. Scott River Co.*, supra, is directly in point. It is my conclusion that the action was properly dismissed by the trial court.

(83 N. W. Rep. 238.)

MICHAEL PRONDZINSKI vs. JAMES GARBUTT.

Opinion filed April 26, 1900.

**Judgment—Irregular Entry—Findings of Fact and Conclusions of Law—
Vacation of Judgment.**

This action was brought for equitable relief, and, an issue of fact being joined, was tried to the court. Evidence was offered by both parties, and the trial court directed the entry of judgment dismissing the action with costs, and for other relief, whereupon, on January 30, 1899, judgment was entered upon said order. No findings of fact or law were ever made or filed by the trial court, nor were findings ever waived. On the 13th day of November, 1899, plaintiff moved in the District Court for an order setting aside such judgment, said motion being made upon various grounds, including the fact that no findings were ever made or waived in the action. Said motion was granted, and an order was made vacating the judgment, from which order defendant appeals to this court. The order will be affirmed. The judgment was irregularly entered, and the order directing its entry in the absence of findings or a waiver thereof was made without authority of law.

Entry of Second Judgment—Dismissal Without Prejudice—Innocuous Surplusage.

Subsequently, and on the same day said judgment was vacated, the trial court made and filed its findings of fact and law in the action, and upon motion of plaintiff's counsel the trial court directed the entry of a judgment dismissing the action at plaintiff's cost; and judgment upon such order was forthwith entered. The order and judgment both carefully stated the grounds and reasons upon which the court based its adjudication, and then provided as follows: "The court orders that the action be dismissed, but without prejudice to the rights of the plaintiff to litigate in a proper action the other questions in this case, which said questions have not been litigated and decided in this case." Defendant appeals from said judgment, and claims that the same was entered without authority of law for reasons appearing in the opinion. *Held*, upon grounds stated in the opinion, that the last judgment is in all respects regular except that the language embodied in the order and judgment which is above quoted should not have been used, and that such language is purely obiter, and surplusage. It was proper to state the grounds and reasons upon which the court acted in deciding the case, but to what extent the adjudication made in this case may or may not prejudice the plaintiff in prosecuting some other action pending or to be brought between the parties is a different matter, and one wholly foreign to any matter at issue in this action. This language, so far as it assumes to deal with questions not before the court, is therefore improper, and, the same is disapproved. But, inasmuch as no motion was made in the trial court to eliminate the language quoted from the judgment, this court will allow the same to stand in the record as innocuous surplusage.

Appeal from Order and from Judgment by One Notice Improper.

Certain matters of practice are considered in the opinion, no formal decision being made thereon.

Appeal from District Court, Walsh County, *Sauter, J.*

Action by Michael Prondzinski against James Garbutt. Judgment for plaintiff, and defendant appeals.

Affirmed.

Templeton & Rex and *De Puy & De Puy*, for appellant.

Cochrane & Corliss and *Fraine & Douglass*, for respondent.

WALLIN, J. The facts embraced in this record, which are, in our judgment, controlling of the case, may be summarized as follows: The action is brought to obtain relief in equity, and, an issue of fact being joined in the action upon the complaint and answer, the case came on for trial in the District Court in June, 1895. At the trial both sides introduced testimony, whereupon the plaintiff's counsel, being convinced from the evidence that plaintiff could not, in any event, prevail in the action without bringing in an additional party, without resting the case requested the trial court to enter an order bringing in an additional party. This request was never directly acted upon by the trial court, and no action of any kind appears to have been taken in the case whatever until the following year. On July 20, 1896, the court, without making findings, entered an order for judgment in the action, whereby the court determined as follows: "That the complaint herein be dismissed, and that the *lis pendens* filed herein be discharged, and that the defendant recover his costs and disbursements in this action taxed and allowed at the sum of twenty-six dollars and fifty cents." So far as it appears in this record, no further steps were taken in the action until the 30th day of January, A. D. 1899, at which date judgment was formally entered by the District Court pursuant to the terms of said order as above set out. No mention is made in said order or said judgment of the question of *res judicata* or prejudice to another action, nor does the order or judgment in terms declare whether the judgment was or was not entered after a submission of the case, or as a result of a voluntary dismissal of the action by the plaintiff. It does appear, however, that no findings of fact or law were ever made or filed by the trial court prior to the entry of said judgment; and further appears that findings were never waived in any manner. Subsequently, and upon November 13, 1899, the District Court entered an order setting aside and vacating the judgment entered January 30, 1899, as aforesaid; said order being signed by the Honorable O. E. Sauter, who presided when the case was brought on for trial, and who signed the order for judgment. The order vacating said judgment embraced the following language: "Now, on the affidavit of Guy C. H. Corliss and the oral testimony of W. R. De Puy, and also the affidavit of James Garbutt, W. R. De Puy, and Charles F. Templeton, and upon the

evidence heretofore taken in this case, and it appearing to the satisfaction of the court, and the court of its own knowledge being cognizant of the fact, that this action was never finally submitted to the court for a decision, and that no findings of fact or conclusions of law were ever made by the court herein; that such findings and conclusions have never been waived herein: It is ordered that said judgment heretofore entered herein on the 30th day of January, 1899, and the said order for judgment herein, be, and the same are hereby, in all things set aside and annulled. Dated November 13, 1899." An examination of the affidavits and proofs upon which said vacating order of November 13th was made discloses the fact that upon the hearing of the application to vacate the judgment the court was required to determine certain questions of fact, which questions were, briefly, whether the plaintiff's counsel ever, formally or otherwise, submitted the case on plaintiff's behalf for its decision, or whether the trial court intended to allow the case to be dismissed without prejudice; also whether findings had ever been made or waived in any manner in the action. These questions are all raised here, except that it is now undisputed that findings in the action were never made or waived prior to the entry of said judgment on January 30, 1899. In our opinion, the concession that no findings were made, and that findings were not in any manner waived, is alone decisive upon all questions involved in the appeal from the order of November 13, 1899, vacating the judgment. The absence of findings, when not cured by a waiver, both facts appearing of record affirmatively, is a plain violation of mandatory provisions of the statute, and is in itself an irregularity in the entry of the judgment which fully justified the trial court in setting aside the judgment. The irregularity was one which could be attacked by motion in the court which entered the judgment. See *Garr, Scott & Co. v. Spaulding*, 2 N. D. 414, 420, 51 N. W. Rep. 867. We therefore hold that the order of the District Court vacating the judgment of January 30, 1899, was properly made, and hence must be affirmed.

We now turn to another feature of the record. It appears that the trial court, after vacating its judgment, as already stated, and on the same day its vacating order was signed, made and filed its findings of fact and law in the action, and directed the entry of a judgment thereon. Said order, omitting its title, is as follows: "The issues in this action having come on for trial before the court, and evidence having been offered and received on the part of the plaintiff and defendant, and the plaintiff having asked leave of the court to bring in as a party defendant one Joseph Garbutt, to whom it appeared from the undisputed evidence in the case the defendant had transferred the real estate involved in this action before the commencement thereof, and no decision of said application having ever been made, and the parties to said cause having failed to pro-

ceed further with the matter, the court makes the following findings of fact in this case, to-wit: That the defendant, James Garbutt, had, prior to the commencement of this action, transferred the real estate described in the complaint herein to one Joseph Garbutt by a deed of conveyance. And the defendant having offered evidence of no other defense in the case, and the said fact of said conveyance not being disturbed, the court finds as a conclusion of law that the present action to obtain from the defendant, James Garbutt, a quitclaim deed of the property in question cannot be maintained, for the reason that the said defendant, James Garbutt, has no title to said land to convey; and upon this ground, and this ground only, the court orders that this action be dismissed, but without prejudice to the rights of the plaintiff to litigate in a proper action the other questions in this case, which said questions have not been litigated and decided in this case. It is ordered that judgment be entered by the clerk of this court in accordance with this decision." Upon these findings and order for judgment a judgment was formally entered by the District Court, which, so far as material, is couched in the following language: "It is adjudged that this action be dismissed on the sole ground that the defendant had, previous to the commencement thereof, transferred the real estate in question to another person, and therefore could not be compelled to give to the plaintiff a quitclaim deed thereon. And it is further adjudged that the dismissal of this action shall be without prejudice to the rights of the plaintiff to litigate in a proper action all the other questions involved in this cause, which said questions were not litigated upon the trial of this action. Dated November 13, 1899." Defendant has appealed to this court from said last-mentioned judgment, and also states in his notice of appeal that he appeals from the order upon which said judgment is based, said order being the order last above mentioned.

This record clearly shows that the judgment entered November 13, 1899, except as hereinafter stated, was in all respects regularly entered, and all doubt and uncertainty is effectually removed as to the existence or nonexistence of certain facts about which counsel are at loggerheads with respect to the first judgment. The last judgment was entered after a consideration of the evidence adduced at the trial, and upon findings of fact and law made by the trial court. Nor was this judgment entered upon any request on plaintiff's part for leave to dismiss or withdraw the action; nor was it entered prematurely, and before the case was submitted to the District Court for its decision upon the merits. On the contrary, this judgment was ordered to be entered upon the motion of plaintiff's attorneys in the action. An examination of the judgment in connection with the pleadings discloses the fact that the judgment is responsive to the issues in evidence in the case, and that it determines such issues adversely to the plaintiff. The complaint is meager, but the effect of its averments are, briefly, that the de-

fendant was seised of the record title of the land described in the complaint, and that defendant was under a legal and moral obligation to quitclaim the land to the plaintiff upon payment of a certain sum alleged to be due to the defendant. The sole object of the action, as indicated by the complaint and the prayer for relief, was to get the title of the land transferred to the plaintiff, either by deed from the defendant or by a decree of the court. It is conceded that the undisputed evidence in the case shows that at a date prior to the commencement of the action the defendant had sold and conveyed the land to a stranger, and there was nothing in the pleadings and nothing in the evidence to show that such stranger received the land with any notice whatever of plaintiff's rights or claims in or to the land. Upon such issues and evidence but one judgment was legally possible, and that judgment was entered. The court denied the relief asked for, and dismissed the action with costs. The court found from the evidence "that the present action to obtain a quitclaim deed of the property in question cannot be maintained, for the reason that the said defendant, James Garbutt, has no title to said land to convey; and upon this ground, and this ground only, the court orders that this action be dismissed." We think the scrupulous care manifested in stating and limiting the ground of the decision as embodied in the findings was entirely proper under the circumstances. The trial court was advised of the fact that another action was pending between the same parties, wherein said first judgment was set out in defendant's answer as a bar to the prosecution of said other action. Upon such a state of facts it was, we think, entirely proper at least to indicate in the findings and in the judgment as finally entered the precise questions which were judicially determined in this action. This was done, but the trial court went much further, in the following language, which is quoted from the judgment entered November 13, 1899: "And it is further adjudged that the dismissal of this action shall be without prejudice to the rights of the plaintiff to litigate in a proper action all the other questions involved in this cause, which said questions were not litigated upon the trial of this action." In our judgment, the language last quoted was improperly incorporated in the judgment, and is wholly inoperative as a determination of what questions may be determined in any other action between the same parties. The judgment may and does determine what issues were judicially determined in this action; but, in so far as it attempts to reach out and dispose of issues in no wise involved in this action it is dealing with matters *coram non judice*. It may eventuate that the judgment from which we have quoted will be pleaded in bar of another action pending or to be brought between the parties to this action, and if this course is taken, the question will be then presented to the court whether the judgment is a bar, and to what extent, if any, it is a bar. But, in the nature of the case, no such question can be predetermined. Its solution, if it ever arises, will turn upon the issues

presented by the pleadings in the action in which the bar is pleaded, and upon established principles of law governing the question. Nor can the deliverances made by a court in another action upon different issues have the slightest weight in the determination of the questions arising in the contingency suggested. Our conclusion is that this language is purely obiter and surplusage. We do not strike it out, however, for the reason that no application was ever made to the trial court to eliminate the same from the judgment. Had a motion been made below to correct the judgment in this respect, it would, doubtless, have been stricken out as surplusage; at least we are clear that it is surplusage, and as such wholly imperoperative as a judicial determination of any question in the present case, or any question which may arise in future litigation between the parties to this action.

This disposes of the merits of all questions presented by this record, but we deem it best, in the interests of orderly procedure, to briefly advert to certain questions of practice arising upon the record. Defendant, in his notice of appeal to this court, declares, in effect, that he appeals from two several orders, each of which is particularly described, and also declares that defendant appeals from a certain judgment, which is described in the same notice. One of the orders appealed from—that vacating the judgment—is an appealable order, and, of course, the judgment was appealable. Under the notice the defendant has attempted by one notice of appeal to take two wholly independent appeals to this court. This cannot be done, under the rule established by the Wisconsin cases cited below, which cases we would be inclined to follow, inasmuch as the present appeal law of this state is taken chiefly from the laws of the State of Wisconsin regulating appeals, and the cases were decided before the law was adopted in North Dakota. See *White v. Appleton*, 14 Wis. 190; *Chamberlain v. Gage*, Id. 193; *Noble v. Strachan*, 32 Wis. 314. See, also, *Hackett v. Gunderson*, 1 S. D. 479, 47 N. W. Rep. 546; *Anderson v. Hultman* (S. D.) 80 N. W. Rep. 165. At the present term a motion to dismiss an appeal upon this ground, viz: duplicity, was made, and granted by this court; but, the point not being raised in the case at bar, it is passed over. We allude to the matter only in a cautionary way. The defendant also states in his notice that he appeals from a certain other order directing the entry of the judgment entered November 13, 1899. This is harmless in the notice because an order for judgment is nonappealable. The order is reviewable, however, on appeal from the judgment. *In re Weber*, 4 N. D. 119, 129, 59 N. W. Rep. 523, 28 L. R. A. 621. Our conclusion is that the order vacating the judgment entered January 30, 1899, was properly made, and hence must be affirmed, and that the judgment entered in this action on November 13, 1899, is a valid judgment, and hence the same will be affirmed. All the judges concurring.

(83 N. W. Rep. 23.)

MOSES MERCHANT vs. MICHAEL PIELKE.

Opinion filed April 27, 1900.

Injunction—Violation—Contempt—Appeal—Effect—Appealable Order.

Plaintiff obtained a degree against defendant containing injunctive provisions. After the entry of the decree, and after notice thereof, defendant (as plaintiff alleges) repeatedly violated the injunctive provisions. Plaintiff obtained an order on defendant to show cause why he should not be adjudged in contempt. On the return of the order defendant, as a defense, set up the fact that he had appealed from the decree, and filed a proper supersedeas bond, said appeal having been taken and perfected after the issuance of the order to show cause. The fact of the appeal and supersedeas being admitted, the court held as matter of law that the decree was superseded, and that the defendant could not be adjudged in contempt, and discharged the order to show cause. *Held*, (1) That the proceeding set forth a civil, and not a criminal, contempt, and that it was properly instituted by plaintiff to enforce obedience to a decree in his favor, under the provisions of section 5934, Rev. Codes. (2) Under the provision of section 5937, Rev. Codes, this proceeding must be treated as a motion in the original action after judgment, and the order discharging the order to show cause is an appealable order, under subdivision 2, § 5626, Rev. Codes. (3) The appealability of the order is not affected by the provision of section 5954, giving the accused party who has been adjudged in contempt a right of appeal in all cases. (4) The perfecting of the appeal and filing of the supersedeas could have no retroactive effect, and could not purge a contempt committed while the decree was in full force and effect.

Appeal from District Court, Richland County; *Pollock*, J.

Action by Moses Merchant against Michael Pielke. Judgment for defendant, and plaintiff appeals.

Reversed.

Smith Stimmel, for appellant.

The supersedeas does not suspend or impair the operation of the injunction of the District Court pending appeal. Under the statute, whatever there is in the judgment that is mandatory is stayed by the supersedeas, but whatever there is in the judgment that is prohibitory is not stayed. § 5516, Rev. Codes; *Dewey v. Superior Court*, 22 Pac. Rep. 233; *Stewart v. Stewart*, 35 Pac. Rep. 156. The purpose of an injunction is to hold the subject of litigation in *statu quo* until the final determination. There are exceptions to the rule that an injunction is not dissolved or suspended by appeal, and the exceptions are where the judgment commands or permits some act to be done. In such cases a stay of proceedings can be had. *Sixth Avenue Ry. Co. v. Gilbert*, 71 N. Y. 430; *Hoinlen v. Cross*, 63 Cal. 44; *State v. Harnose*, 26 S. E. Rep. 270; *Swift v. Sheppard*, 64 Cal. 423; *Bliss v. Superior Court*, 62 Cal. 543; *Marced Mining Co. v. Freemont*, 7 Cal. 130; 2 High. on Inj. § § 1698, 1699; *Northwestern Mutual Life Ins. Co. v. Park Hotel*

Co., 37 Wis. 125; *Telephone Co. v. Com'srs*, 10 N. E. Rep. 922; 12 N. E. Rep. 136. A contempt proceeding is not a proceeding in the action. It grows out of the action but is not a part of it, and is in the nature of a criminal procedure. *State v. Harness*, 26 S. E. Rep. 370; *Herdman v. State*, 74 N. W. Rep. 1079. It has been questioned as to whether or not threats of personal violence referred to in the judgment can be the subject of injunction. In aggravated cases of continuing acts, which cannot be adequately compensated in damages, the remedy by injunction may be had. *Jerome v. Rose*, 7 Johns. Ch. 315, 11 Am. Dec. 484; *Carney v. Hadley*, 22 L. R. A. 233; *Lynch v. Union Inst.*, 22 L. R. A. 842.

Morrill & Engerud and *A. E. Sunderhauf*, for respondent.

The error of the trial court, if it is one, in refusing to hear the proof and punish the defendant for his alleged violation of the injunctive parts of the judgment cannot be reviewed on appeal. The relator has no personal interest and no substantial right to be enforced from the denial of which he can appeal to this court. *State v. Davis*, 2 N. D. 461, 51 N. W. Rep. 942; *In re Fanning*, 41 N. W. Rep. 1076; *State v. District Court*, 42 N. W. Rep. 598. Statutes granting stays on appeal are remedial, and strict literal construction is never tolerated. 2 Enc. Pl. & Pr. 20. Our appeal law was borrowed from Wisconsin. §§ 3047 to 3072, Sanborn & Berryman's Ann. State. Construing this statute, the Superior Court of Wisconsin have held that on appeal the policy of the law is to provide for a stay of proceedings upon compliance with the prescribed terms. *Northwestern Mut. Life Ins. Co. v. Park Hotel Co.*, 37 Wis. 125; *Hudson v. Smith*, 9 Wis. 122. The "*statuo quo*" mentioned in the decisions means the *statuo quo* before judgment and not the *statuo quo* after judgment. It is plain, therefore, that to enforce the prohibitory part of the judgment is equivalent to enforcing the mandatory part. This is well illustrated in *Schwarz v. Superior Court*, 43 Pac. Rep. 580; *Stewart v. Superior Court*, 35 Pac. Rep. 56.

BARTHOLOMEW, C. J. Plaintiff was in possession of certain lands and certain buildings thereon under a contract with defendant, who was the owner of the land. Disputes arose between them as to the possession and right of possession of certain of the buildings and certain land. These disputes reached the stage of personal violence, and, as the record shows, defendant threatened plaintiff with great damage to his person and property if he (the plaintiff) persisted in his claims of possession. Plaintiff brought an action in equity to reform the contract under which he held, and thereby settle these aggravated differences. The court, in the main, held with plaintiff, and reformed the contract, and fixed the rights of the respective parties thereunder. That holding was affirmed by this court. See *Merchant v. Pielke*, 9 N. D. 182, 82 N. W. Rep. 878. The decree in that case directed that the defendant should

remove certain fences and obstructions that he had erected for the purpose of excluding plaintiff from the possession of certain lands and privileges, and continued: "It is further ordered, adjudged, and decreed that said defendant Michael Pielke, his agents or attorneys, or person or persons acting for him, be, and they are hereby, enjoined from molesting or threatening plaintiff, or any member of his family, or his employes, with personal violence, or from doing or threatening any injury to any of plaintiff's stock on said premises; * * * and that they be further enjoined from in any way or manner interfering with plaintiff, or any member of his family, his employes, or any person or persons acting for him, in his use and occupancy of said farm, and from in any manner hindering or delaying plaintiff in his work and labor thereon during the terms of said lease." This decree was rendered October 11, 1899, and a copy thereof served on the defendant on October 20, 1899. On November 27, 1899, plaintiff procured an order on defendant to show cause why he should not be adjudged in contempt for disobedience of the injunctive features of the decree. This order was based upon affidavits setting forth repeated and somewhat aggravated violations of the injunction after a copy thereof had been duly served upon defendant. Upon the return of the order to show cause, the defendant answered, and, among other things, set up the fact that he had appealed from the decree by serving a proper notice of appeal and supersedeas bond, and filing the same in the office of the clerk of the court. The date when these papers were served and filed does not appear by the abstract. The lower court would, of course, know from its own records, and it is stated in the brief of appellant, and is not challenged, that they were served upon appellant's counsel on November 28, 1899, the day after the order to show cause was issued, and filed in the clerk's office on December 1, 1899, the day upon which the order was returnable. We must accept this as correct. After the filing of the answer, by some practice that is not made clear by the record, the question of law was raised as to whether the filing of the supersedeas bond had the effect of dissolving or superseding the injunctive part of the decree. The court ruled that it did, and that, therefore, the defendant could not be adjudged in contempt for violating the decree, and thereupon dismissed the order to show cause. From this order of dismissal the plaintiff appeals to this court.

The first and most difficult point presented by the appeal concerns the appealability of this order. Respondent contends that the contempt charged is a criminal contempt, and hence appellant has no interest in the subject-matter that gives him any standing in an appellate court. We cannot concede this. Our Revised Codes (section 5934) define civil contempts as follows: "Every court of record has power to punish by fine and imprisonment, or either, a neglect or violation of duty or other misconduct by which a right or remedy of a party to a civil action or proceeding pending in the

court may be defeated, impaired, impeded or prejudiced in the following cases." After stating a number of cases, it continues, in subdivision 3: "Or for any other disobedience to any lawful order, judgment or process of the court." The allegations in the petition for the order to show cause bring this case clearly within this definition of a civil contempt. It also comes clearly within the provisions of subdivision 8 of the same section, which reads: "In any other case expressly authorized by the codes or statutes of this state, or where an attachment, or any other proceeding to punish for a contempt has been usually adopted and practiced in a court of record to enforce a civil remedy or to protect a right of a party to an action or proceeding in such court." The contempt power of a court of chancery has often been used to enforce obedience to its decrees. Rap. Contempt, § 3, and cases cited in notes; also *State v. Davis*, 2 N. D. 461, 51 N. W. 942, and cases cited. Indeed, that was the only method of enforcing chancery decrees until the sequestration of property was introduced in chancery. 2 Daniell, Ch. Prac. 1045, 1046. The contempt charged is a civil contempt, and the plaintiff invokes the exercise of the power of the court for the purpose of enforcing a decree in his favor. Section 5937, Rev. Codes, relating to the practice in contempt cases, declares: "An order to show cause may be made in the action or proceeding in or respecting which the offense was committed, either before or after the final judgment or order therein, and is equivalent to a notice of motion; and the subsequent proceedings thereupon shall be taken in the action or proceeding as upon a motion made therein. In case an attachment is issued it shall be deemed an original special proceeding by the state as plaintiff against the accused as defendant." This provision relieves us in this case of all embarrassment as to the nature of the proceeding. It is neither an action nor a special proceeding. It is simply a motion in an action after judgment. The provision first appears in this state in the revision of 1895. It was enacted after the decision in *State v. Davis*, supra, and doubtless to settle certain questions there discussed. The matter being treated as a motion in the action made after judgment, it follows that the order dismissing the proceeding is a final order, made upon a summary application in an action after judgment; and, as the order clearly affects a substantial right, it is specifically declared appealable by subdivision 2 of section 5626, Rev. Codes. Nor do we think this provision suspended or inoperative by reason of the provisions of section 5954, Rev. Codes, found in the contempt practice act. That section gives an accused party who has been adjudged guilty of contempt a right of appeal in both civil and criminal contempts. But we do not think it was intended thereby to exclude all other appeals in connection with contempt. Before that statute was enacted, this court had held in the *Davis Case* that an accused person adjudged guilty of a criminal contempt had no right of appeal. It was a much-mooted question. The statute was, we think, enacted to establish a con-

trary rule to that announced in the *Davis Case*, but we do not think it ever entered the legislative mind to suspend a portion of the general appeal law in civil cases. We hold the order appealable, and we are clear that it must be reversed. Counsel present this matter upon the theory that the one point involved is whether or not due service of a notice of appeal and supersedeas bond had the effect of superseding the injunctive or prohibitive features of the decree. We are at a loss to see how that question can, by any possibility, arise upon this record. There was no perfected appeal or supersedeas bond in this case until December 1, 1899. All of the acts charged as contempts occurred prior to November 27, 1899, and after defendant had notice of the decree. At the time of the occurrences the decree was a valid, binding decree, and in full force. Whatever may have been the effect of the supersedeas bond upon offenses thereafter committed, it could not have a retroactive effect, and condone offenses already committed. A party who has violated an injunctive decree with impunity, and placed himself hopelessly in contempt of court, cannot, when cited before the court, purge his contempt by then appealing from the decree and filing a supersedeas bond. We cannot conceive that such could be the law. We find no case where the point has been directly ruled, and we are not surprised that we do not. We do find cases where decrees have been violated after appeal without supersedeas, and such violations have been punished as contempts. Certainly such party could be in no worse position than one who had taken no appeal. As bearing upon the point, see 4 Enc. Pl. Prac. 793; *O'Callaghan v. O'Callaghan*, 69 Ill. 552; *Heinlen v. Cross*, 63 Cal. 44; *People v. Bergen*, 53 N. Y. 404; *Hunt v. Lambertville*, 46 N. J. L. 59. The order discharging the order to show cause is reversed. All concur.

(83 N. W. Rep. 18.)

RALPH W. SHEPARD, *et al* vs. OLE K. HANSON.

Opinion filed May 2, 1900.

Action on Note—Directing Verdict.

The mere possession of a negotiable promissory note, which is not payable to bearer and is unindorsed, by another than the payee, is not prima facie evidence of the ownership of such note. Accordingly it was error for the trial court to direct a verdict for the amount of the note in suit; there being no other evidence of title, and plaintiff's ownership being denied by the answer.

Powers of Guardian.

A guardian, in making contracts relating to the estates of his wards, can bind himself only, and can bind neither his wards personally nor their estates.

Appeal from District Court, Cass County; *Pollock*, J.

Action by Ralph W. Shepard and another, by W. C. Resser,

guardian, against Ole K. Hanson. Judgment for plaintiffs, and defendant appeals.

Reversed.

Hildreth & Ingwaldson, for appellant.

Turner & Lee, for respondents.

YOUNG, J. This action was originally commenced by Frank W. Herline, as guardian of the estate of Ralph W. Shepard and Fred L. Shepard, minors, to recover for his wards the amount due upon a certain promissory note executed by the defendant, and which it is alleged is the property of these minors, and is wholly unpaid. After the issues in the case were joined, and some time prior to the trial of the action, Herline resigned as guardian; and the County Court of Cass county, which had appointed him, appointed in his place W. C. Resser, who, by stipulation of counsel, was substituted as plaintiff. At the close of the case the District Court, upon motion of plaintiffs' counsel, directed a verdict in plaintiffs' favor for the full amount claimed, and judgment was ordered and entered on the verdict. Defendant's appeal is from the judgment, and, in a settled statement, he presents for review numerous alleged errors of law. Among these, the only one we shall have occasion to notice is the order directing a verdict for the plaintiffs. The defendant's answer admits the execution of the note, but specifically denies that it is or ever was the property of the plaintiff's wards, and alleges that the note ever was and is the individual property of Frank W. Herline, the payee named in the note, and that any transfer or indorsement thereof by him was without consideration and in bad faith. For a further defense the defendant then set up three several counterclaims as existing in his favor and against Herline, as guardian, and his two wards, arising out of work, labor, and services alleged to have been done and furnished for them at their request. The amount of these claims exceeds the amount of the note sued upon. The following is the note, in full: "Mapleton, North Dakota, July 1st, 1892. Ninety days after date I promise to pay to the order of F. W. Herline one hundred and fifty-four dollars, at Red River Valley National Bank of Fargo, value received, with interest at the rate of 12 per cent. per annum. I hereby agree to pay the further sum \$—— as attorney's fees, should the collection of this note be enforced by law. Ole K. Hanson." The following indorsement appears upon the back: "Pay to the guardian of Ralph W. and Fred L. Shepard, F. W. Herline, without recourse." The motion for a directed verdict was based upon the ground "that defendant had failed to show any defense by way of nonownership of the note by plaintiffs, or counterclaim or payment." This motion was granted, and, we hold, improperly granted. The ownership of the note by plaintiff's wards was specifically controverted by the answer. It was therefore incumbent on the plaintiff to establish by evidence the ownership and title to the notes in his wards, as

a basis for recovery. The present guardian testified that it had been turned over to him by his predecessor, Mr. Herline, and that he had it in his possession. The note was then received in evidence. This is all the evidence offered to establish title to the note in the wards. This was insufficient. It is true that the possession of a negotiable instrument payable to bearer or payable to order, and indorsed in blank or indorsed to the holder, is prima facie evidence of ownership, and that the holder acquired it bona fide for full value, in the usual course of business, before maturity, and without notice of any circumstance impeaching its validity. See Daniel, Neg. Inst. § 812. But it is equally true that the possession by one not the payee of such an instrument, which is not indorsed and is not payable to bearer, is not prima facie evidence of ownership by the party having possession, where the ownership is controverted. In *Van Eman v. Stanchfield*, 10 Minn. 255 (Gil. 197), the court said: "Where a negotiable note, payable to order, is transferred without indorsement, the holder takes it as a mere chose in action; and, while he may maintain an action upon it in his own name, he must prove the transfer to himself, and mere possession is not prima facie evidence of the fact." See, also, in support of the doctrine that the possession of an unindorsed promissory note by one not the payee is no evidence of the ownership of the holder, *Cavitt v. Tharp*, 30 Mo. App. 131; *Dorn v. Parsons*, 56 Mo. 601; *Merlin v. Manning*, 2 Tex. 351; *Ross v. Smith*, 19 Tex. 171; 4 Am. & Eng. Enc. L. (2d Ed.) 319; Daniel, Neg. Inst. § 812; Rand Com. Paper, § 792. The note, it will be seen, is payable to order, and not bearer; and it is not indorsed by the payee, either generally in blank, or specially to any person by name. The words on the back of the note, "Pay to the guardian of Ralph W. and Fred L. Shepard," are not a direction to pay either to the wards themselves or to their estate. If the language used has any effect, it is as an indorsement to some person, not by name, but by description. The person described was F. W. Herline, the payee in the note, so that no new feature was added to the note by these words. It was already payable to himself, and was at best no more than a direction to pay to himself. As to the effect of words *descriptio personae*, see *Thornton v. Rankin*, 19 Mo. 194; *Jeffries v. McLean*, 12 Mo. 355; *Mellen v. Moore*, 68 Me. 390; *Sharw v. Smith*, (Mass.) 22 N. E. Rep. 887, 6 L. R. A. 348.

There being no evidence of ownership of the note in suit by plaintiff's wards, it was therefore error to direct a verdict in his favor, and the judgment must accordingly be reversed. But, inasmuch as a new trial must be had, we wish to refer to the counterclaims set up by defendant. Counsel for the respective parties have spent considerable time discussing the evidence, to determine whether or not there is any evidence that the contracts with the defendant which are the basis of the counterclaims were made by Herline as guardian, and for and on behalf of his wards. It is

the contention of plaintiff's counsel that he acted individually. It may be conceded that defendant's contention is true, and that Herline acted as guardian and that the services were for him as guardian, yet it is entirely immaterial. It was still Herline's personal contract, for the law is well settled that the guardian of an estate of minors cannot as such make a contract which will bind the wards personally or their estate. He is bound personally. *Rollins v. Marsh*, 128 Mass. 116; *Hospital v. Fairbanks*, 132 Mass. 414; *Sperry v. Fanning*, 80 Ill. 371; *Adams v. Jones*, 8 Mo. App. 602; *Dalton v. Jones*, 51 Miss. 585; *Tenney v. Evans*, 14 N. H. 343; *Phelps v. Worcester*, 11 N. H. 51. In *Reading v. Wilson*, 38 N. J. Eq. 446, the court said: "A guardian has no authority whatever to bind either the person or the estate of his ward by contract. It is his duty to see that his ward is maintained and educated in a manner suitable to his means, and if, in the performance of this duty, it becomes necessary for him to enter into contracts, such contracts impose no duty on the ward, and do not bind his estate, but bind the guardian personally and alone. For any reasonable expenditure made by a guardian, out of his own means, for the benefit of his ward, he is, of course, entitled to be reimbursed out of the ward's estate; but this is the limit of the ward's liability, whether measured by rules of law or rules of equity. A guardian is without the least capacity or authority to impose contract obligations on his ward." Whatever causes of action the defendant has, then, arising out of his alleged services to Herline as guardian of those wards, exist against Herline individually. The District Court is directed to enter an order reversing its judgment and granting a new trial. All concur.

PETITION FOR REHEARING.

Counsel for plaintiff have filed a petition for a rehearing, in which it is urged that the court was mistaken in asserting that there is no evidence in the record showing that plaintiff's wards are the owners of the note in suit. They contend that there is other evidence than that sought to be derived from the possession of the instrument, and refer us to a certain written account or report made by Herline at the close of his guardianship, and filed and recorded in the county court on March 21, 1899. This document, which was received in evidence against defendant's objection, purports to be an account of Herline's guardianship from January 12, 1892, up to the time it was filed in the County Court. Under the heading of "Receipts" there appears this entry: "July 1st, 1892. Ole K. Hanson paid on \$168 note \$14.00, interest on said note \$19.02." Under the heading of "New Notes" the following entry appears: "(Stock) Ole K. Hanson, dated April 1st, 1892, due 90 days, 12 per cent. par, ren \$168." This abbreviation evidently means that the last-described note is a part renewal of the former note, and doubtless refers to the note in suit. On the margin of the report, and opposite the description of the note involved in this action, and certain other notes, these words appear: "These notes are not assets of the

guardianship." It would seem that this entry conclusively negatives the idea that the note in question belongs to plaintiff's wards. However, it is unimportant what is meant by these entries; for, conceding that they tend to show that Herline purchased the note, and from the funds of these wards, yet that fact utterly fails to establish title of the note in the wards. At best, the note can be no more than an investment of the wards' funds made by the guardian, for it was not a part of the original assets. The law requires investments to be made in a particular manner, and a guardian in this state may not either sell his ward's property, or make investments of his ward's funds, save on an order of the County Court. The office of a guardian is highly fiduciary in its nature, and has been made the subject of careful regulation by statutory provisions. A guardian may pay the just debts of his ward, and demand and sue for debts due to his ward. He may apply the income and profits of the estate to the comfortable and suitable maintenance and support of the ward. In these matters considerable latitude is given to his discretion. See sections 6553, 6554, 6556, Rev. Codes. But the power to sell the estate of the wards, or any portion of it, does not rest in the guardian individually. Neither has he authority to invest the funds of the estate in any kind of securities, except upon application to, and an order of, the County Court. The legal authority for both sales and investments emanates from the County Court, and that court alone. See sections 6561 to 6574, Id., both inclusive. The requirement as to the method to be pursued to make sales of property and to invest funds belonging to wards is specific, and requires that it shall be in pursuance of an order or decree therefor. It was held by the Supreme Court of Iowa, in construing a statute which required guardians to manage estates under the direction of the court, that such requirement implied an inhibition upon the doing of these acts without the direction of the court. See *Bates v. Dunham*, 58 Ia. 308, 12 N. W. Rep. 309. And the court in that case also held that a direction to loan the funds of the ward must precede the act of loaning. In the very recent case of *Easton v. Somerville* (Iowa) 82 N. W. Rep. 475, the court said: "A guardian cannot, as at common law, loan his ward's money, or invest it in securities, without an order of court. His powers are conferred by statute, and he may loan their money, and in all other respects manage their affairs, under proper orders of the court or a judge thereof. Code, § 3200. Under this section it has been held that a guardian cannot loan the money of his ward, lease his land, or invest his funds without an order of court. * * * Such transactions, made without the order or direction of the Probate Court, are invalid or voidable, at least, until approved by the proper court." See, also, *McReynolds v. Anderson*, 69 Ia. 208, 28 N. W. Rep. 558; *Slusher v. Hammond*, 94 Ia. 512, 63 N. W. Rep. 185; *Reed v. Lane*, 96 Ia. 454, 65 N. W. Rep. 380; *Garner v. Hendry*, 95 Ia. 44, 63 N. W. Rep. 359; *Alexander v. Buffington*, 66 Ia. 360, 23 N. W. Rep. 754; *Dohms v. Mann*, 76 Ia. 724, 39 N. W. Rep. 823.

The County Court of Cass county has exclusive jurisdiction over this estate, and it does not lie within the jurisdiction of any other court to usurp its authority by fastening the title of a guardian's void investments upon his wards by independent evidence. It is patent, then, that where the issue is whether the wards own certain property, which is the fruit of an investment made by the guardian, we must look to the order or decree of the County Court authorizing or directing it, and not to the guardian's report, for the latter is binding only upon himself. In this case plaintiffs have offered no evidence to show that Herline was authorized by the County Court to purchase the note in suit, or that such purchase was approved by the County Court. Neither was the report of the guardian filed in the County Court, and above referred to, approved and allowed. When the plaintiff's wards obtain their majority they may demand the original estate, or its value, reduced only by lawful expenditures and such bad investments as have been authorized by the County Court. They are not at the mercy either of the improvident judgment of their former guardian, or his unlawful diversion of their funds. The bond required to be executed under section 6544, Rev. Codes, stands in lieu of the original estate until it is fully accounted for under the statutes regulating the powers and duties of guardians. It is not necessary to consider whether the written report of Herline was admissible for any other purpose. It is sufficient to say that it has no probative weight on the question of the title of the note, for the reasons already stated. If it affirmatively appeared that no order was in fact made either authorizing or approving the investment of the funds of the wards in the note in suit, it would clearly be our duty to direct a dismissal of the action. As the case stands, however, the record is simply silent on that point. For that reason the order reversing the judgment and directing a new trial, which will afford an opportunity to produce competent evidence of ownership in the wards if it exists, will stand. The petition for a rehearing is denied.

(83 N. W. Rep. 20.)

A. C. FOGGMAN *vs.* DANIEL PATTERSON, *et al.*

Opinion filed May 10, 1900.

Homestead—Selection—Extent and Value.

Where the head of a family owns a section of land, and his dwelling house stands upon one governmental quarter section thereof, he may select his homestead from any portion of such section that may best suit his convenience and interests, with the limitations that such selection must include the dwelling house and appurtenances, and must not exceed 160 acres in extent or \$5,000 in value.

Levy—Homestead Claim—Presumption from Failure to Assert.

But where no homestead has been selected or homestead declaration filed for record as provided by law, either by the head of the family

or his wife, and where upon the levy of execution upon the whole section under a judgment against the owner thereof no claim of exemption is made either by the owner or any member of his family, no presumption of law arises that the debtor claims as his homestead the particular governmental quarter section upon which his dwelling house stands.

Waiver of Homestead Right.

Under such circumstances the debtor, or some one authorized by law to make the claim for him, must claim some specific portion of the section as his homestead, or the homestead right will be waived, and a sale under the execution will pass the debtor's title.

Estoppel by Laches.

Where a judgment creditor of the grantors, with an execution levied upon the land, brings an action in aid of such execution against the grantors and the grantee, claiming that the conveyance was fraudulent as to creditors, and asking that it be set aside and the judgment declared a lien upon the land, and where the defense of homestead, if it existed, was available to either and all of such defendants, and must have defeated a recovery by the plaintiff, but no such defense was interposed, and the relief asked was decreed, the fraudulent grantee cannot, in a subsequent action between himself and the assignee of the purchaser at an execution sale of the land on the judgment, but made after the entry of the decree, defeat such sale by setting up the homestead defense, of which he failed to avail himself in the first instance.

Appeal from District Court, Traill County; *Pollock, J.*
Action by A. C. Foogman against Daniel Patterson and Stener G. Wenaas, sheriff. Judgment for plaintiff, and defendants appeal.
Affirmed.

F. B. Lambert and P. G. Swenson, for appellants.

The judgments of John E. Paulson, et al were not at any time liens on the land in suit, which was used and occupied by G. A. Ward as his homestead. §§ 4326, 5104, 5126 and 5127, Comp. Laws; §§ 4678, 5490, 5516, 5517 and 3605, Rev. Codes. The fraudulent conveyance from the Wards to Patterson did not enlarge the rights of the judgment creditors, nor did it give them a right to enforce their judgments out of any property which was exempt before such conveyance was made. *Munson v. Carter*, 58 N. W. Rep. 931; *Beyer v. Thoenig*, 46 N. W. Rep. 1074; *Bloedorn v. Jewell*, 52 N. W. Rep. 367; *Shawano County Bank v. Koeppen*, 47 N. W. Rep. 723; *Horton v. Kelley*, 41 N. W. Rep. 1031. The claim of the creditors is not under or through the fraudulent conveyance but adverse to it, and when at their suit it has been set aside and declared void they cannot be allowed as creditors to set up the void conveyance against which they are claiming for the purpose of enlarging their rights or remedies against the debtor, or for the purpose of estopping him from the assertion of the rights which he would otherwise have as against them. *Sears v. Hawks*, 14 Ohio St. 298; Wait on *Fraud. Conv.* § 46. The fraud does not consist in conveying the homestead, but in conveying the other land that the

creditors can reach by execution. *Thomp. on Hd.* § 411; *Smith v. Runsey*, 33 Mich. 191; *Pike v. Miles*, 21 Wis. 168; *Kvello v. Taylor*, 5 N. D. 76; *Horton v. Kelley*, 41 N. W. Rep. 1031. The recital in the judgments setting aside the fraudulent conveniences that the judgments are liens on all the lands cannot have the effect to create a lien on the homestead. The lien of a judgment is in fact no part or portion of it, but only an effect or incident of the judgment, and is entirely the creation of statute. *Nygren v. Nygren*, 60 N. W. Rep. 885; *City of St. Louis v. Canty*, 65 Ill. App. 325; *Capelle v. Baker*, 3 Munt. (Del.) 344. In the actions against Ward, *et al*, the question as to whether any of said land was the homestead of Ward was not litigated nor in issue. Any recital in the judgment, in so far as it attempts to affect the homestead exemption, can be of no force or effect. *Gille v. Emmons*, 58 Kan. 116; *Reynolds v. Stockton*, 43 N. J. Eq. 211; *Metcalf v. Hart*, 3 Wyo. 513. A party cannot, in this indirect manner, overrule the express provision of the statute that a judgment shall not be a lien on the homestead. *Peerson v. Truax*, 25 Pac. Rep. 183. No estoppel can arise from the judgments in the Paulson case and Daisy Roller Mills case, because the homestead question was not at issue and was not litigated in any of these actions. *Fahey v. Esterley Mch. Co.*, 3 N. D. 220; *Sobolisk v. Jacobson*, 6 N. D. 175; *Cromwell v. County*, 94 U. S. 351; *Wyman v. Hallock*, 57 N. W. Rep. 197, 4 S. D. 469; *Quigley v. McEvony*, 59 N. W. Rep. 767; *Johnson v. Bartek*, 76 N. W. Rep. 878; *Phillips v. Root*, 31 N. W. Rep. 718; *Noyes v. Belding*, 62 N. W. Rep. 953, 6 S. D. 629. No estoppel arises because Patterson as assignee of the Paulson judgments levied on and attempted to sell the homestead, because none of the elements of an estoppel are proven to have been present. *Bigelow on Estop.* 570; *Parleman v. Young*, 2 Dak. 175; *Martin v. Zellerbach*, 38 Cal. 300; *Davis v. Davis*, 26 Cal. 23; *Smith v. Sprague*, 77 N. W. Rep. 689; *Guychard v. Brande*, 15 N. W. Rep. 764; *Betts v. Sims*, 41 N. W. Rep. 117; *First Nat. Bank v. Maxwell*, 123 Cal. 360; *Delany v. Cuning*, 52 Wis. 266; *Jamieson v. Miller*, 20 N. W. Rep. 491; *Blodgett v. Perry*, 97 Mo. 263; *New York Rubber Co. v. Rothery*, 107 N. Y. 310; *Marble Co. v. Duffy*, 27 N. E. Rep. 430. When everything is equally known to both parties, although they were mistaken as to their legal rights, no estoppel arises. *Estes v. Jackson*, 111 N. C. 145; *Smith v. Sprague*, 77 N. W. Rep. 689; *Brothers v. Bank*, 84 Wis. 381. No estoppel can arise from a levy and sale on execution as against the execution creditor when he makes no representations or inducement at the time of the sale. *Martin v. Zellerbach*, 38 Cal. 300. The Paulson judgment was not a lien on the homestead; therefore, the attempt to sell the same under said judgment was void. *Bauman v. France*, 56 N. W. Rep. 395; *Kendall v. Clarke*, 10 Cal. 17. There is no issue of estoppel under the pleadings to be available for plaintiff. The estoppel relied upon should have been plead. *Davis v. Davis*, 26 Cal. 23; *McKeen v.*

Naughton, 26 Pac. Rep. 354; *Gooding v. Underwood*, 50 N. W. Rep. 618; *Pearson v. Harding*, 64 N. W. Rep. 904; *School District v. Bank*, 27 N. W. Rep. 255; *Engleston v. Mason*, 51 N. W. Rep. 1; *Golden v. Hardesty*, 61 N. W. Rep. 913; *Devotie v. McGerr*, 15 Colo. 467; *Nebraska Co. v. Blust*, 60 N. W. Rep. 1016; *Hammerslough v. Cheathan*, 84 Mo. 21; *Dwellinghouse Ins. Co. v. Johnson*, 47 Kan. 5; *Fanning v. Ins. Co.*, 37 Ohio St. 346; *Kidder v. Aaron*, 72 N. W. Rep. 893.

Carmody & Leslie, for respondent.

Patterson cannot now set up Ward's former homestead right as a defense, because he not only failed to object to the sale and its confirmation, but ordered the sale and purchased the land at the sale, and then when it was redeemed accepted the money. *Traders' Nat. Bank v. Schorr*, 54 Pac. Rep. 543; *Snapp v. Snapp*, 9 S. W. Rep. 705. After a debtor has made a fraudulent conveyance of land to cheat his creditors, and they have brought suit to set it aside for fraud, he may yet claim homestead therein in the same proceedings, but it is too late to claim after neglecting to do so in such proceeding. *Waples on Hd.* 531 and 532; *Norris v. Kidd*, 28 Ark. 406; *Fritz v. Fritz*, 32 Ark. 327; *Larson v. Reynolds*, 13 Ia. 57; *Haynes v. Meak*, 14 Ia. 320; *Tablock v. Eccles*, 20 Tex. 783. If the recital in the judgments against Ward that the same were liens upon this land, expressly describing the quarter, was erroneous, they should have been corrected in those cases, and not being so corrected are now binding. *Paulson v. Nichols & Sheppard Co.*, 8 N. D. 606, 80 N. W. Rep. 765; *Ingwaldson v. Skrivseth*, 8 N. D. 544, 80 N. W. Rep. 475.

BARTHOLOMEW, C. J. On and prior to December 20, 1888, one G. A. Ward was the owner of section 9, township 145, range 49, Traill county, N. D. His wife, Jessie S. Ward, owned the south half of section 10, same township; and one H. H. Hall, a son of Mrs. Ward by a former marriage, owned a half section adjoining, or in the immediate vicinity. The Wards resided on the southwest quarter of said section 9. Upon said section 9 there were at that time three interest-bearing mortgages, belonging to one Mrs. French, and which may be known as the "French mortgages." The Wards and Hall had become indebted to the firm of Paulson & Co., doing business in said county; and Paulson & Co. had obtained two small judgments against G. A. Ward, and had brought another action against the three parties to recover some \$1,700. Other unsecured creditors were pressing the Wards and Hall. On said December 20, 1888, the Wards and Hall, by warranty deeds, transferred all their land to the defendant Daniel Patterson. These deeds were at once placed of record. They were in fact given as security; a defeasance being executed by Patterson at the same time, but not placed of record. Subsequently Paulson & Co. pro-

cured judgment upon their third claim. They issued execution upon all their said judgments, which were returned *nulla bona*, and afterwards alias executions were issued and levied upon all the lands above mentioned. Paulson & Co. then brought an action in aid of their said executions, and against the Wards and Hall and Patterson, asking to have said deeds set aside and declared void as to the said claims of Paulson & Co., and said judgments declared liens upon said land. The plaintiffs in that action were successful, and obtained a decree adjudging the right of Patterson in the land to be junior and inferior to the rights under the Paulson judgments, and declaring said judgments to be liens upon all of said lands. No claim of homestead was made or mentioned in that case. That decree was affirmed in this court. *Paulson v. Ward*, 4 N. D. 100, 58 N. W. Rep. 792. The date of this affirmance was March 19, 1894. In the meantime other creditors of the Wards and Hall, whose claims existed at the time of the execution of the deeds to Patterson, had obtained judgments on their claims; and, pursuing the same course that had been pursued by Paulson & Co., they brought an action against the same parties, asking to have the deeds declared void as to them, and their judgments declared liens upon the land. No claim or defense of homestead was made in that case. These plaintiffs were also successful, and their decree was affirmed in this court on January 8, 1897. See *Daisy Roller Mills v. Ward*, 6 N. D. 317, 70 N. W. Rep. 271. Soon after the remittitur was sent down in the case of *Paulson v. Ward*, and on May 25, 1894, Patterson purchased the Paulson judgments, and had them assigned to one Cameron. Subsequently other executions were issued upon these judgments, and all of the lands covered by the deeds were sold under said executions; Patterson being the purchaser in each instance. The northeast quarter of section 9 was sold separately. The remainder of the section, including the tract now alleged to be a homestead, was sold for a lump sum. Only a small portion of the judgments were satisfied from the sale of section 9, probably by reason of the existence of the French mortgages thereon. The greater part of the judgments were satisfied from the lands of Mrs. Ward and Hall. The sales of their lands were made on March 7 and April 28, 1896. Within the year for redemption the other creditors of the Wards and Hall, who had established their judgments as liens upon said lands senior to any claim of Patterson under his deeds, in the order of their priority, redeemed from the execution sales to Patterson. The present plaintiff, Foggman, was the owner by assignment of the junior judgment. He paid the sum of \$11,707 to redeem, and received the sheriff's certificate issued to Patterson, and on May 21, 1897, he received the sheriff's deed upon the certificate. In February, 1898, Mrs. French began foreclosure proceedings upon one of her mortgages on said section 9. Patterson purchased the rights of Mrs. French under the mortgage, and obtained a decree of foreclosure and order of sale. Patterson also purchased and had assigned to him the

other two French mortgages. To prevent a sale of the land, Foogman undertook to purchase all of the French mortgages, and to obtain assignments thereof. Patterson refused to assign the mortgages, whereupon Foogman paid the amount then due upon all of said mortgages, being something over \$10,000, and Patterson at once satisfied of record the two mortgages that had not been foreclosed. Soon after the final decision in *Paulson v. Ward*, Patterson began an action against the Wards and Hall only, asking to have his deeds, absolute on their face, declared mortgages and foreclosed as such. In said action such proceedings were had that on April 26, 1897, Patterson obtained a judgment against said parties for some \$31,000, and a decree of foreclosure as against all of said land. Subsequently, and after the sheriff's deed had been issued to Foogman as stated, and after Foogman had paid the French mortgages, and after the same had been satisfied as stated, Patterson caused a special execution to issue under his said decree of foreclosure, and placed the same in the hands of his co-defendant, Wenaas, as sheriff of Traill county, and caused the same to be levied upon the southwest quarter of said section 9, and the same was by said sheriff duly advertised for sale under and pursuant to said decree. Foogman, as owner of the land, brought this action to permanently enjoin the sale. The plaintiff was successful, and Patterson appeals.

The position of the defendant is that the southwest quarter of said section 9 was the homestead of the Wards, and that, as such, the judgments obtained against the Wards were no liens upon that tract; that the law so declared; and that no decree could make the judgments liens against the homestead, as it was expressly exempt from all forced sale upon execution. Therefore the sale to Patterson under the Paulson judgments passed nothing whatever, and plaintiff received no title under the sheriff's deed, and the title still remains in G. A. Ward, and, the French mortgages being satisfied, the entire estate in the tract, legal and equitable, is subject to sale under Patterson's foreclosure decree against the Wards. The defendant brought into court, and tendered for the use of plaintiff, the amount received by him upon the redemption from his sale of so much of said section 9 as was sold in a lump with said southwest quarter; the amount being \$191. This contention requires an examination of our homestead law. Section 3605, Rev. Codes, declares: "The homestead of every head of a family residing in this state, not exceeding in value five thousand dollars, and if within a town plat, not exceeding two acres in extent, and if not within a town plat, not exceeding in the aggregate more than one hundred and sixty acres, and consisting of a dwelling house in which the homestead claimant resides and all its appurtenances and the land on which the same is situated shall be exempt from judgment lien and from execution or forced sale except as provided in this chapter." The next section shows from what property the homestead may be taken. It reads: "If the homestead claimant is married the home-

stead may be selected from the separate property of the husband or, with the consent of the wife, from her separate property. When the homestead claimant is not married, but is the head of a family within the meaning of section 3625, the homestead may be selected from any of his or her property; provided, that the homestead so selected must in no case embrace different lots or tracts of land unless they are contiguous." Turning to section 3621, we have the manner of this selection: In order to select a homestead the husband or other head of the family, or in case the husband has not made such selection, the wife must execute and acknowledge in the same manner as a grant of real property is acknowledged a declaration of homestead and file the same for record." And section 3622 reads: "The declaration of homestead must contain: (1) A statement showing that the person making it is the head of a family; or when the declaration is made by the wife, showing that her husband has not made such declaration for their joint benefit. (2) A statement that the person making it is residing on the premises and claims them as a homestead. (3) A description of the premises. (4) An estimate of their cash value." The following section requires the declaration to be recorded in the office of the register of deeds of the proper county. We notice that this homestead may be selected from any real estate belonging to the head of the family, with the restrictions that it must include the dwelling house and appurtenances, and that it must not include two tracts or lots of land unless they be contiguous. But, so long as it remains in one body, the selection may be in such form as will best subserve the interests of the family. When the statutes have been fully complied with, the homestead selection is complete for all purposes, and all the world has notice thereof. No judgment, barring the exceptions named in the statute, constitutes any lien thereon. No officer may levy upon it, and perhaps it may be, as appellant contends, that no sale thereof under execution would pass any title. But in this case, so far as this record shows, there never was any selection of homestead or any homestead declaration filed. True, that fact does not defeat the homestead right. The party still has a right to make his selection; but until he exercises that right the law does not know, and no one can say, where that homestead may be. There is not the slightest presumption that it follows governmental subdivisions of sections. G. A. Ward, the head of the family in this case, owned all of section 9. He could carve his homestead as he chose; keeping only within the limit as to extent or value, and including the dwelling house. Yet it would be absurd to say that the judgment attached as a lien to no part of the section, because any part was liable thereafter to be selected as a homestead. Ward never has selected any homestead in this section of land, and, of course, Patterson cannot select one for him. Nor, as we understand it, does he attempt so to do. His claim is that, as Ward was living upon the southwest quarter of the section at the time of the sale to Patterson, necessarily that quarter section constituted the homestead, without any selection

previously made, and without any indication of the fact at any time prior to the sale. As we have seen, that cannot be true, under our statute. While the party may select his homestead from any portion of a tract much larger than the law allows for a homestead, it necessarily follows that no homestead can be identified until the selection is made. We make our ruling only upon the facts of this case. We do not say that the ruling would be the same when a debtor head of a family resided upon a tract that did not exceed in extent or value the homestead limit as fixed by law. But, where a selection is necessary in order to identify the homestead, then the selection must be made, or the homestead right is waived. We have no statute whatever giving an officer holding an execution any authority or any duty to perform in the matter of selecting the homestead. That rests solely with the debtor and his family. In Wisconsin the statutes exempted "a homestead consisting of any quantity of land not exceeding forty acres used for agricultural purposes, and the dwelling house thereon and its appurtenances to be selected by the owner thereof." In *Kent v. Agard*, 22 Wis. 150, the court said: "But we cannot hold that the owner of a homestead right is limited in his selection to the forty acres according to the government survey, upon which his dwelling house is situated. There is nothing in the statute establishing such a limitation, and in many instances it might be extremely inconvenient and disadvantageous. His house might be near the line on one forty, and his barns, outhouses, gardens, etc., be on the adjoining forty. There can be no doubt that in such case it was the design of the statute to allow him to select, without regard to the government survey, any forty acres, in reasonable shape, that would include his dwelling." The constitution of Michigan provided for a homestead exemption, with a limit as to quantity and value. In *Beecher v. Baldy*, 7 Mich. 488, the court, by Christy, J., at page 506, said: "We think, therefore, that where the whole tract owned and occupied by the debtor does not exceed the quantity mentioned in the constitution, and is admitted to be within the prescribed value, the law, in the absence of any proof, must presume the acceptance by the debtor of the benefit conferred by the constitution, to the full amount of the constitutional exemption; and this upon the same ground that the acceptance of a grant is presumed; that the constitution only contemplates a selection when it is necessary to bring the homestead within the limitation, as to quantity and value, specified in the instrument, and as a means of separating it from a tract of larger amount or greater value, and defining its boundaries." And again, at page 508: "Whenever the tract including the homestead exceeds the quantity limited by the constitution, a selection by the debtor becomes necessary to distinguish that which is exempt from that which may be sold at the instance of creditors. And the debtor, to entitle himself to the exemption of any part of it, must proceed to select it, so far as the law has provided a mode of selection." See, also, *Rogers v. Hawkins*, 20 Ga. 200, and *Pinkerton v. Tumlin*, 22 Ga. 165. The principle of these

cases is the same as that which requires the debtor to select personal property claimed as exempt. Where, for instance, the statute exempts a team of horses, and the debtor owns but one team, he need make no selection; but, if he own more than one team, he must select, in order to save his exemptions. *Wallace v. Lawyer*, 54 Ind. 509; *Cole v. Green*, 21 Ill. 105; *Frost v. Shaw*, 3 Ohio St. 270; *Butt v. Green*, 29 Ohio St. 667; *Twinam v. Swart*, 4 Lans. 263; *Turner v. Borthwick*, 20 Hun, 119. Nor does the application of this rule in this state amount to permission to the husband to dispose of the homestead right without his wife's consent. She may select the homestead if the husband fail so to do. Section 3621, Rev. Codes. Likewise she may claim exemption if the husband fail so to do. Section 5523, Id. She failed so to do in this case, and she is not before this court asking any relief by reason of such failure.

From these principles we think it follows that plaintiff did receive title under and by virtue of the sheriff's deed, and that such title is superior to any rights of defendant Patterson under the foreclosure decree. But we reach the same conclusion for another reason: After the Paulson judgments had been obtained, executions were issued thereon, and levied upon this tract of land. Thereafter, and while the levy was in full force, an action was brought in aid of this execution, asking to set aside the deed to Patterson, and establish the judgment as a lien upon the land. G. A. Ward and Jessie S. Ward and Daniel Patterson were all parties defendant to that action. If this tract in question were in fact the homestead of the Wards, that defense would have been available to each and all of said defendants, because there cannot be, as to creditors, any fraud in the conveyance of exempt property. But, as stated, no such defense was suggested, and the relief prayed was granted. Now, one of the defendants in that action seeks to avoid a sale made pursuant to the lien established by that decree, by reason of a defense available to him, and which, if pleaded, would have defeated any decree. We think, on plainest principles, this cannot be done. In *State v. Manly*, 15 Ind. 8, an action was brought upon a constable's bond to recover, as in conversion, for property sold by the officer on execution which it was claimed was exempt from such sale. An action against the relator had been aided by attachment. He defended the action, but made no claim that the attached property was exempt. Judgment went against him, with the usual order for the sale of the attached property. In deciding the case that court said: "The order for the sale of the property was a final judgment, beyond which the officer was not required to look, and behind which the relator could not go in order to assert his right to claim the property as exempt from sale. If the proper practice be for the officer serving the attachment, upon proper demand, to set apart to the debtor such property as may be exempt from execution, then he only returns, as attached, such as is not thus exempt, and such only is ordered to be sold upon final judgment against the defend-

ant. If, however, such be not the proper practice, and if the officer cannot thus be required to determine, at his peril, whether the defendant is entitled to hold the property as exempt, the remedy of the debtor is sufficiently plain. He may set up his claim, to hold the property as exempt from sale, in the court from which the attachment issues, as a defense to such attachment. *Collins v. Nichols*, 7 Ind. 447; *Cooper v. Reeves*, 13 Ind. 53. If neither of these courses be pursued, but final judgment be rendered against the defendant, and the attached property ordered to be sold, we think it too late for the defendant to set up a claim that the property is exempt from sale for his debts." The case at bar is squarely within that principle. Nor is it any answer to this position to say that, the homestead being absolutely exempt, no exemption need be claimed. It is "the homestead as created, defined, and limited by law" that is absolutely exempt. We have already seen what that means. A mere floating homestead right, unattached to any land in a manner that can identify the land as a homestead, cannot create an absolute exemption in land that may subsequently be designated and identified as a homestead. The judgment and decree of the District Court are made the judgment and decree of this court, and are in all things affirmed. All concur.

(83 N. W. Rep. 15.)

CASS COUNTY v. AMERICAN EXCHANGE STATE BANK.

Opinion filed May 12, 1900.

Action on Bond—Evidence—Erasure.

In an action upon a bond with a large number of sureties, it appeared on the face of the instrument that one name that had been signed as surety had subsequently been erased, and other names appeared below the erased signature. *Held*, that the bond was primarily admissible in evidence, that the legal presumption was that the erasure was innocent and not fraudulent in fact or in law, and that the burden rested upon the other signers to show that their implied contract of contribution had been altered by the erasure.

Appeal from District Court, Cass County; *Pollock*, J.

Action by the County of Cass against the American Exchange State Bank of Buffalo and others. Judgment for defendants, and plaintiff appeals.

Reversed.

Fred B. Morrill and *Edward Engerud*, for appellant.

Plaintiff proved the execution and delivery of the bond in suit, but it was refused admission in evidence because of an alteration or erasure appearing on its face. This was error, because the presumption was that the alteration was made before delivery and the defendants had the burden of showing that such alteration was made after delivery. *Hagen v. Ins. Co.*, 46 N. W. Rep. 1114; *Wilson v. Hayes*, 40 Minn. 531, 4 L. R. A. 196; *Little v. Herndon*,

77 U. S. 156; *First Nat. Bank v. Laughlin*, 4 N. D. 391, 61 N. W. Rep. 473. The erasure or change of name, even if made by the company's officer, after delivery, without the consent of the obligors, would not be material, as it does not change in any manner the rights and obligations of the parties. 2 Am. & Eng. Enc. L. 222, 223 and note 1; *Dirby v. Thrall*, 44 Vt. 413, 8 Am. Rep. 389; *Turner v. Billagram*, 2 Cal. 520; Throop on Pub. Officers, § 190; Note B to *Master v. Miller*, Smith's Leading Cases (9th Ed) 1169.

Barnett & Rees, for respondent William Beard.

W. J. Clapp, for respondent Neil McPhedron.

Newman, Spalding & Stambaugh, for respondents W. W. Merrill, P. Masterson, C. A. Bullamore, and P. T. Peterson.

This case falls within the rule that an alteration raises a presumption against the bond when it is suspicious, and this question must be determined solely from the face of the instrument. The character of the alteration, and the facts, are presumptions of fact which arise from its appearance. The bond shows upon its face that Jones' name was erased and Masterson's placed upon the bond after all the other bondsmen had signed it. There is no reason why Masterson should have signed this bond at all. There are eight sureties upon the bond without him. If this substitution was made after the other sureties had signed, and without their consent, they were all released. Murfee on Official Bonds, § 760; *State v. Craig*, 12 N. W. Rep. 301; *United States v. Smith*, 2 Wall. 219. The alteration being suspicious, before the bond could be offered in evidence it was incumbent on plaintiff to explain the alteration. *United States v. Smith*, 2 Wall. 219.

BARTHOLOMEW, C. J. The defendant the American Exchange State Bank of Buffalo, pursuant to the provisions of article 8, chapter 26, Pol. Code, became a depository of county funds for the plaintiff county. For the proper security of said deposits, said defendant executed its bond to said county, with all the other defendants as sureties thereon. The bank failed to pay over the funds deposited as by said bond it was required to do, and this action is on the bond, to recover the balance unaccounted for. The bank made default, as did the defendants Bayley and Moug. The other defendants answered, setting up, in effect, that the bond sued upon was not their contract, by reason of certain erasures. Plaintiff at the trial offered the bond in evidence. It was objected to by reason of the erasures. The objection was sustained. Plaintiff then proved that when the bond was delivered it was in the same condition as when offered in evidence, and again offered the bond. The same objections were repeated, and the bond was again rejected. The basis of plaintiff's action being thus excluded, the court, on motion of the defendants, directed a verdict in their favor.

The only assignment of error that we shall discuss is that relating to the ruling in excluding the bond. The original bond was sent

up with the record, and by stipulation we are requested to examine it. We find that the bond consists of a single page, and was prepared on a typewriter. A space was left for the insertion of the names of the sureties, and these were inserted with a pen, doubtless after the bond was signed. The obligee in the bond has been changed from the board of county commissioners of Cass county to the county itself. It is conceded that defendants cannot escape liability by reason of these facts. At the bottom of the sheet upon which the bond is found were prepared eight lines for the names of the sureties. It was evidently one of those cases where the principal went in search of sureties, without knowing who they would be. But we find the lines filled in the following order: S. E. Bayley, Neil McPhedron, John Moug, W. W. Merrill. On the fifth line was originally written the name of W. L. Jones, but this name has been erased by a red ink mark drawn through it. On the sixth line and following are the names of C. A. Bullamore, Reuben Beard, and P. T. Peterson. These names filled all the lines, and the last line is very near the bottom of the sheet, but crowded in below it is the name of the defendant James A. Winsloe. There is no room for anything below Winsloe's name. But, returning back to the fifth line, we find in the space above the erased name of W. L. Jones the name of the defendant P. Masterson. This defendant testifies that he was called into the office of the bank about 7 o'clock in the evening and signed his name to the bond; that the red-ink erasure over the name of W. L. Jones appeared at that time. From the appearance of the bond, we think it a fair inference that the defendant was the last signer on the bond, as it is not reasonable to suppose that he would have crowded his signature in where we find it, had there been room below. It is the erasure of the signature of W. L. Jones that is relied upon as warranting the rejection of the bond. As to the time of the erasure the record is silent, further than the fact that it was erased before Masterson signed. There is nothing to show whether the erasure was made before or after the names below the erasure were signed, nor is there any evidence to show whether or not any of the sureties aside from Masterson ever consented to, or had any knowledge of, such erasure.

Under these facts, what is the rule of law as to the admission of the bond in evidence? In the case of *Bank v. Laughlin*, 4 N. D. 391, 61 N. W. Rep. 473, this court, without citing the authorities, declared that "the legal presumption, prima facie, is that alterations appearing upon written instruments were made before delivery." We regard that as the better rule at the present day. Every phase of decision on the point can be found in the books. A review would be profitless. We content ourselves with quoting from Mitchell, J., in *Wilson v. Hayes*, 40 Minn. 531, 42 N. W. Rep. 467, 4 L. R. A. 196: "The question of presumption and burden of proof, where interlineations or erasures appear on the face of an instrument, is one upon which there is a wilderness of authorities and much conflict of opinion. Any attempt to cite or consider the

innumerable cases on this question would be both impracticable and useless. The rule adopted by some authorities is that the presumption, in the absence of evidence to the contrary, is that the alteration was made before execution, and therefore that no explanation is required in the first instance, while others hold, in accordance with the instruction of the trial court in this case, that the presumption of law is that the alteration was made after delivery, and therefore the burden is upon the holder to explain it, and show that it was made under circumstances that would not invalidate the instrument. In addition to these two leading and opposing views, different courts have adopted certain intermediate or compromise rules, none of which need be here referred to, except one, seemingly adopted by some very eminent courts, to-wit: that the alteration raises a presumption against the instrument when it is suspicious; otherwise, not. But this furnishes no definite rule by which to determine when the burden is upon the holder to explain the alteration, and when it is not. Who is to determine, and by what test, whether the alteration is suspicious? And, if held suspicious, when must it be explained,—before or after it is admitted in evidence? Evidence as to when, by whom, and with what intent an alteration was made may be one or both of two kinds,—extrinsic or intrinsic; the latter being that furnished by the inspection of the instrument itself, such as its appearance, the nature of the alteration, etc. These things, considered in connection with the relation of the parties to the instrument, may often constitute important evidence. And it seems to us that the rule just referred to amounts to nothing more than saying that in some cases this intrinsic evidence may tend to prove that the alteration was made after delivery, and therefore throw the preponderance on that side, unless the holder of the instrument produces extrinsic rebutting evidence. This construed, we could find no special fault with the rule. But it is incorrect to call this a presumption of law; it is simply an inference of fact drawn from evidence in the case." We deem these observations sound and practically unanswerable, and the rule thus announced will, with our present method of doing business, work justice much more certainly than any other rule. Under it the instrument would always be primarily admissible in evidence. If its appearance was suspicious,—in other words, if it carried intrinsic evidence of having been altered after execution,—that would always be a matter to argue to the jury. The other party—the party who, of all persons, best knows whether the erasure was made before or after execution—may always introduce testimony on the point. It is ordinarily no hardship to require him to do so. In cases like the one at bar the party suing will know what condition the instrument was in when it came to his hands, but he cannot know its condition when each signature was affixed; and to show that he must, almost of necessity, depend upon the testimony of the defendants. That always places him at a disadvantage, and is not in furtherance of justice.

If the erasure in this instance was in the body of the instrument,

we might stop here, but it is not. It is in the signatures. The express contract has not been changed in any manner to affect the rights of the obligors. The change, if any, is in the implied contract of contribution among the sureties. The first man who signed the bond signed with the understanding that the principal would procure such additional sureties as might be necessary to make the bond comply with the requirements of the law. Each subsequent surety signed with the same understanding, and with the additional understanding that the particular persons whose names preceded his as sureties should be liable to him in contribution, should he be required to pay the bond. He signed, relying upon their financial responsibility. It is clear, then, that if, after a name is signed as surety, the name of a preceding surety should be erased without the knowledge or consent of the subsequent signer, that, as to him, his contract would be materially altered. It becomes important, then, to determine whether the name of W. L. Jones was erased before or after the names appearing below were signed. But it is a question of fact, and not a question of law,—a question for a jury, and not for a court. We can find no reason for the application of any different principle because the erasure appears in the signatures. If it contains intrinsic evidence that the erasure was made after the other signatures were added, the defendants can urge that before the jury, and it is to their advantage to have the bond in evidence. If it contains no such intrinsic evidence, they cannot object to it. The obligor cannot know the condition of the Jones signature when the following names were signed. But such signers do know, and it is no hardship on them to require them to disclose their knowledge. Counsel for respondents, in their brief, say: "In this case the alteration is not in the body of the instrument; nor is any proof necessary to show that it was made after the signatures of four of the bondsmen had been affixed to the bond, and before the others." If that be true, then surely the subsequent signers have no standing to defeat this action. Nor have the preceding signers, because they did not sign under any agreement or understanding that Jones was to be one of the sureties. True, counsel say that the condition stated in the quotation from their brief brings this case clearly within the ruling in *State v. Craig*, 58 Ia. 238, 12 N. W. Rep. 301, and that all the sureties are released. Counsel misapprehend the case. It was an action on an official bond with a large number of sureties. A name about the middle of the list of signers had been erased. There was no question as to the admissibility of the bond, but the undisputed testimony showed that the erasure was made after all the sureties had signed, and without the knowledge or consent of any, but before delivery. The court held that, as to all sureties who signed after the surety whose name was erased, the erasure changed their contract, and the principal had no authority to deliver the bond as thus changed to their prejudice, and that such sureties were released by reason of the change. As to the sureties whose names preceded the erased signature, the court held that the

implied contract under which they signed, to the effect that the principal would provide a sufficient number of sureties to insure the approval of the bond under the law, had not been complied with. The court could not presume that the bond met that requirement, with so many sureties released. We certainly make no criticism upon that case. The case of *Smith v. U. S.*, 2 Wall. 219, 17 L. Ed. 788, is much relied upon by respondents, but it decides no point as to the admissibility of the bond. True, it states (and many such decisions may be found) that, where an alteration appears in an instrument, the party offering it in evidence is bound to show that the alteration was made under such circumstances that it does not affect his right to recover. But in that case the bond was admitted in evidence, and while it was admitted over objection, and the point saved, yet it is not further noticed in the opinion, and the case was reversed for refusal to give an instruction asked. But, had that case ruled against the admission of the bond, we could not follow it, because we hold, in accord with what we regard as the preponderance of the recent decisions, and certainly the better reasoning, that an alteration is not presumptively fraudulent, either in fact or law. The judgment of the District Court is reversed, and a new trial ordered. All concur.

(83 N. W. Rep. 12.)

MARTIN P. GJERSTADENGEN, *et al* vs. WM. J. HARTZELL.

Opinion filed May 12, 1900.

Administrator's Deed—Mistake of Law—Estoppel.

An administrator, who, as such, and under the direction of the Probate Court, sells land which, under a mistake of law, in which the purchaser shares, is believed to belong to the estate, but which in fact does not, and executes an administrator's deed therefor, without personal covenants, is not estopped by such deed from asserting title in himself; neither does the deed estop his heirs from asserting title derived from him. *Gjerstadengen v. Van Duzen*, 7 N. D. 612, 76 N. W. Rep. 233, followed.

Receipt of Money Paid by Mistake of Law Does Not Operate as Estoppel.

Held, further, that the fact that such administrator individually received the entire proceeds derived from a sale of the land, the same being allowed and paid upon a debt due him from the estate, does not, under the circumstances of this case and set out in the opinion, estop him or his heirs from asserting title which he then had or thereafter acquired, which title was then unknown to him.

It is Essential that Party Asserting Estoppel Should Suffer Loss.

Held, further, that it is essential to an estoppel which will defeat his title to the land that it shall appear that the party asserting the estoppel will suffer loss, unless the holder of the title is prevented from asserting it.

Co-tenant Not Entitled to Compensation for Improvements in Partition.

This is an action in equity to partition farm lands owned by several co-tenants. One of the co-tenants demands that he be allowed compensation for certain breaking and backsetting done by a remote grantor in his chain of title. *Held* that, inasmuch as it does not appear that such improvements were necessary, or that they were assented to by his co-tenants, and it does appear that they were for the personal benefit of the person making them, and that the rents of the premises for the time he possessed them more than offset the value of such improvements, such claim should not be allowed.

Demurrer to Counter Claim Sustained.

Held, that the demurrer interposed to the portions of the answer which set up facts by way of an estoppel to defeat plaintiff's title and the counterclaim for improvements was properly sustained.

Appeal from District Court, Ransom County; *Lauder, J.*

Action by Martin Peterson Gjerstadengen and others against William J. Hartzell. Judgment for plaintiffs. Defendants appeals. Affirmed.

J. E. Bishop and *C. D. Austin*, for appellant.

The action of *Gjerstadengen v. Van Dusen & Co.* was pending until its final determination on appeal on the 2d day of June, 1898. § 5739, Rev. Codes; *Aldrich v. Case*, 73 N. W. Rep. 161; *Martin v. Gilmore*, 72 Ill. 200; *Hills v. Sherwood*, 33 Cal. 478; *Brown v. Evans*, 18 Fed. Rep. 59; *Natzger v. Gregg*, 99 Cal. 83, 33 Pac. Rep. 757; *In re Blythe's Estate*, 99 Cal. 472, 33 Pac. Rep. 108; *Storey v. Storey*, 100 Cal. 41, 34 Pac. Rep. 675; *Brown v. Campbell*, 100 Cal. 635, 35 Pac. Rep. 433; *Fresno Mill Co. v. Fresno Canal Co.*, 101 Cal. 582, 36 Pac. Rep. 412; *Sharon v. Hill*, 26 Fed. Rep. 337, 346; § 1049, Cal. Code Civ. Pro.; *Washburn v. Van Steenwyk*, 32 Minn. 355; *Bryan v. Farnsworth*, 19 Minn. 239, 20 N. W. Rep. 324. No notice of *lis pendens* having been filed, defendant had not constructive notice of the pendency of the action. § 5251 Rev. Codes; *Head v. Fordyce*, 17 Cal. 152; *Mills v. Bliss*, 55 N. Y. 141; *Richardson v. White*, 18 Cal. 103; *Jewell v. Land Co.*, 64 Minn. 540; *Conkey v. Dyke*, 17 Minn. 457. The full title to the premises is in appellant as appears upon the face of the records, and respondents are endeavoring to establish a mere equity as against appellant, a bona fide purchaser, without any notice whatever thereof, either actual or constructive. Purchasers without notice are protected against mere equities. *Frost v. Beckman*, 1 Johns. Ch. 288; *Florence v. Leighler*, 58 Ala. 225; *Farmers' L. & T. Co. v. Maltby*, 8 Paige 361; *Paul v. Fulton*, 25 Mo. 156. The decree of the District Court in the *Van Dusen & Co.* case, not having been recorded in the register of deeds' office prior to the conveyance to the defendant, was not constructive notice. The statute provides that a decree must be recorded in the office of the register of deeds and is within the recording act. §§ 3563, 3594, 3595. Rev. Codes. In

view of the fact that such a recordation is authorized, the record of such decree is constructive notice to subsequent purchasers of the property affected thereby. *Storey, Eq. Jur. § 404; Farmers L. & T. Co. v. Maltby*, 8 Paige Ch. 361. A decree in a chancery suit is not notice until it is recorded. *Roner v. Bingham*, 1 Ind. 542. Improvements made upon the property must be considered in the partition, and the allegations in reference to the same in the answer are not demurrable. *Dean v. O'Mera*, 47 Ill. 120; *Kurtz v. Hibner*, 55 Ill. 514; *Robinson v. McDonald*, 11 Tex. 385; *Sarbach v. Newell*, 30 Kan. 102; *Allen v. Hall*, 50 Me. 265. The right of a tenant in common to compensation for improvements made by him is not a legal right dependent upon a statute, but is a right enforceable in a court of equity. *Alleman v. Hawley*, 117 Ind. 532; *Ward v. Ward*, 29 L. R. A. 452, note E; *Green v. Putnam*, 1 Barb. 507; *Cosgriff v. Foss*, 152 N. Y. 104, 36 L. R. A. 753. When the appeal in the Van Dusen & Co. case was perfected, the force and effect of the judgment was destroyed, and it was dormant or ineffectual for all purposes during the pendency of the appeal. There being no statute authorizing or requiring a supersedeas bond in this class of cases, the appeal operates as a supersedeas. The common law rule is in force in the absence of statutory restrictions. *Hudson v. Smith*, 9 Wis. 116; *Hart v. The Mayor*, 3 Paige 381; *Birch v. Conrow*, 116 Pa. St. 121; *Woodbury v. Bowman*, 13 Cal. 635, 24 Am. & Eng. Enc. L. 586, note 5; *Wade v. Colonization Society*, 4 Sm. & Mar. 671. Where a suit is pending in the Supreme Court on appeal, the judgment below is suspended for all purposes, and it is not evidence upon the questions at issue even between the parties. *Woodbury v. Bowman*, 13 Cal. 635; *Murray v. Green*, 64 Cal. 364; *Atkins v. Wyman*, 45 Me. 399; *Stalbird v. Beattie*, 36 N. H. 455; *Hutchraff's Ex'r. v. Gentry*, 2 J. J. Marsh, 499. The conveyance of the premises to appellant was after the appeal had been perfected, while it was pending, and prior to the entry of final judgment on the appeal. The decree, therefore, was inoperative even as notice at this time. *McGarrahn v. Maxwell*, 28 Cal. 92; *Yeaton v. U. S.*, 50 Cranch, 281; *Paine v. Cowdin*, 17 Pick. 142; *Davis v. Cowdin*, 20 Pick. 510. The counterclaim is properly pleaded and the demurrer to it should not have been sustained. Appellant, in addition to the claim for improvements asks affirmative relief. The rule is that where a defendant asks affirmative relief, it must be done by counterclaim or cross-bill. *German v. Machin*, 6 Paige Ch. 288; *Martindale v. Alexander*, 26 Ind. 105. A claim of defendant in partition suit for the value of improvements made should be presented by cross-bill. *Stafford v. Nutt*, 35 Ind. 95; *Freeman on Co-tenancy*, § 504. Partition is a proceeding in equity. *Packard v. King*, 3 Col. 211; *Mulligan v. Poole*, 35 Ind. 64; *Gooddale v. District Court*, 56 Cal. 29; *Freeman on Co-tenancy*, § 505.

T. A. Curtiss and Morrill & Engerud, for respondents.

This action is a sequel to the case of *Gjerstadengen v. Van Dusen*,

7 N. D. 612, and has been before this court before. *Gjerstadengen v. Hartzell*, 8 N. D. 424. The court below sustained plaintiff's demurrer to those parts of defendant's answer which set forth matters that had been adjudicated in the Van Dusen case, on the ground that the defendant was privy in estate to Van Dusen & Co., and concluded by that judgment. No notice of *lis pendens* was filed. Defendant bought the land after the Van Dusen judgment was entered. The Newman law does not restore the old chancery appeal. Hence, notwithstanding the Newman law provides for a hearing *de novo*, the appeal does not vacate the judgment of the trial court. Under the construction of the Newman law, it does not in reality provide for a trial *de novo* in the literal sense, or in the sense that a trial *de novo* was had on appeal under the old chancery practice. *Jasper v. Hazen*, 4 N. D. 1; *Christianson v. Ass'n*, 5 N. D. 438; *Nichols & Shepard Co. v. Stangler*, 7 N. D. 106. The Van Dusen case was tried after the amendment, chapter 5, Laws 1897. The effect of this amendment is to take out of the original statute the feature of the trial anew in the appellate court. Where an appeal, as in this state, is in effect a writ of error, a judgment is *res adjudicata* from the time of its entry till reversed. Freeman, Judg. § 328; *Nil v. Comparct*, 16 Ind. 107; *Scheible v. Slagle*, 89 Ind. 328; *Padget v. State*, 93 Ind. 398; *Faber v. Hovey*, 117 Mass. 107; *Bank v. Wheeler*, 28 Conn. 433; *Cole v. Connelly*, 16 Ala. 271; *Curtis v. Root*, 28 Ill. 367; *Oakes v. Williams*, 107 Ill. 54; *Moore v. Williams*, 24 N. E. Rep. 619; *Parkhurst v. Berdell*, 110 N. Y. 386; *Stevens v. Stevens*, 23 N. Y. Supp. 520; *Creighton v. Keith*, 70 N. W. Rep. 407; *Bank v. Calvitt*, 3 Sm. & Mar. 143; *Cook v. Rice*, 27 Pac. Rep. 1081; *Willard v. Ostrander*, 32 Pac. Rep. 1092; *Poole v. Senev*, 24 N. W. Rep. 520; *Smith v. Schrimmer*, 56 N. W. Rep. 160; *Thompson v. Griffin*, 6 S. W. Rep. 619; *Snydam v. Hoyt*, 25 N. J. L. 230. An appeal with or without supersedeas does not affect the conclusiveness of the judgment as evidence. *Willard v. Ostrander*, 32 Pac. Rep. 1092. Section 5739, Rev. Codes, was not intended to create a new rule of evidence. The purpose of this statute is plain. Under the old system *lis pendens* terminated upon the entry of judgment. *Scudder v. Sargent*, 17 N. W. Rep. 369; *Parker v. Courtney*, 44 N. W. Rep. 863; *Monell v. Lawrence*, 12 Johns. 534; *Grattan v. Wiggins*, 23 Cal. 16; Black, Judg. § 552; *Sheridan v. Andrews*, 49 N. Y. 478. As a consequence of this rule it was frequently held that a purchaser was not affected by reversal on appeal. To correct this injustice, the rule laid down in § 5739, Rev. Codes was adopted. An appeal, however, does not prevent the enforcement of the judgment unless a supersedeas bond is given. §§ 5610, 5616, Rev. Codes. The doctrine of *lis pendens* is based on necessity. *Bellamy v. Sabine*, 1 Degex. & Jones, 566; *Houston v. Timmerman*, 4 L. R. A. 416; *Brown v. Cohn*, 69 N. W. Rep. 71; 13 Am. & Eng. Enc. L. 870. Under the old system *lis pendens* terminated with the entry of the decree. Purchasers of the property affected by the decree, after its entry, were

not *lis pendens* purchasers, but were bound by the decree, not by reason of any supposed notice of it, but by the doctrine of estoppel. *Paige v. Waring*, 76 N. Y. 463; *Sheridan v. Andrews*, 49 N. Y. 478; 13 Enc. L. 870. The grantee of the person against whom the decree affecting property was rendered is privy in estate with his grantor. *Stranger v. Johnson*, 110 Pa. St. 21; *Tell v. Bennett*, 110 Pa. St. 181; *Goddard v. Benson*, 15 Abb. Pr. 191; Herm. Estop. §§ 139, 143 and 144. Hence, under the rule that a judgment or decree estops parties and privies, a purchaser becomes bound as well as his grantor. *Cushing v. Edwards*, 25 N. W. Rep. 940; *Morrill v. Morrill*, 11 L. R. A. 155; *Howard v. Huron*, 5 S. D. 539; *Eakin v. McCraith*, 3 Pac. Rep. 838; Herm. Estop. §§ 143 and 144. Judgments do not come within the provisions of the recording act. *Hoag v. Howard*, 55 Cal. 564. Every purchaser of a chose in action is conclusively presumed to have full notice of all the infirmities of his vendor's title, and is bound to know at his peril all transactions between his vendor and other previous to an assignment in any way affecting his claim. He gets no better title than his vendor had. *Brown v. Cohns*, 69 N. W. Rep. 71; *Sheridan v. Andrews*, 49 N. Y. 478; Bennett on *Lis Pendens*, § 319. A judgment estops not only as to the issues actually determined, but also as to all matters which could and ought to have been litigated in the action in which it was rendered. *Enderlin State Bank v. Jennings*, 4 N. D. 228; *Howard v. Huron*, 5 S. D. 539; *Eakin v. McCraith*, 3 Pac. Rep. 838; *Morrill v. Morrill*, 11 L. R. A. 155 and note; Herm. Estop. §§ 51, 74, 91, 99, 102, 119, 121, and 127. Plaintiffs can not recover from a tenant in possession any part of the value of the use and occupation of the land. *Ward v. Ward*, 29 L. R. A. 449, note A; *Gage v. Gage*, 28 L. R. A. 829, and notes. Court of equity will not allow compensation for improvement made by a co-tenant solely for his own benefit and in order to realize the increased profits arising from cultivation, where those profits are not shared by his co-tenant. *Cosgriff v. Foss*, 36 L. R. A. 753.

YOUNG, J. This case was before us at a former term upon an appeal from an order of the District Court striking out portions of the answer. The order striking out was sustained in part only. It was held as to certain portions that plaintiff's attack should have been by demurrer. See *Gjerstadengen v. Hartzell*, 8 N. D. 424, 79 N. W. Rep. 872. A demurrer was interposed, when the case went back to the District Court. The present appeal is from an order sustaining the demurrer to those portions. The action is in equity to partition a quarter section of land situated in Ransom county. Plaintiffs allege that they are the owners of 26-27 thereof; that on April 11, 1895, G. W. Van Dusen & Co., a Minnesota corporation, became the owner of the other 1-27, and thereafter claimed title to all of said land; that on August 23, 1897, in an action in the District Court of Ransom county, wherein they were plaintiffs and G. W. Van Dusen & Co. was defendant, a judgment

and decree was rendered and entered adjudging them to be the owners of the share they now claim; that in March, 1898, thereafter, G. W. Van Dusen & Co. executed and delivered to the defendant herein a warranty deed purporting to convey to the defendant the fee-simple title to all of said premises, and that the defendant now claims to own the whole of said premises. Plaintiffs ask that the land be partitioned, and, if that is not found practicable, that it be sold, and the proceeds divided. The defendant, in his answer, denies that the plaintiffs own any interest in the land, but admits his purchase from G. W. Van Dusen & Co. by warranty deed, as alleged in the complaint, and alleges that he purchased the same in good faith, for a valid consideration, and without notice. Defendant also sets forth the origin, nature, and extent of his title, and it is to these portions of the answer the demurrer is directed. So far as important, the facts alleged are substantially these: Olia Mikkleson, who had a homestead entry upon the land in question under section 2289, Rev. St. U. S., died on July 22, 1885, and before making final proof. She left surviving three children, Martin Peterson Gjerstadengen, Peter Peterson Sandvig, and Ole Peterson. The two children first named are parties plaintiff in this action. The third one—Ole Peterson—died in 1893, leaving surviving a widow and six children. With the exception of the interest of one of these children,—Bradley O. Peterson,—which is the 1-27 conceded to belong to the defendant, the interests of the heirs of Ole Peterson are all represented by the plaintiffs in this action. In February, 1886, Ole Peterson made final proof on the land in behalf of the heirs of Olia Mikkleson. Final receiver's receipt was issued to him for them, and on December 15, 1887, a patent to the land was issued by the United States government to the heirs of Olia Mikkleson. In November, 1886, Ole Peterson was, upon his own petition, appointed by the Probate Court of Ransom county, and qualified as administrator of his mother's estate. This land was inventoried as part of the estate. In December of that year he petitioned for an order to sell the land in question to pay the debts of the estate, which amounted to about \$1,600. Pursuant to an order of the Probate Court authorizing and directing such sale, Ole Peterson, as administrator of his mother's estate, sold said land at public auction to one Peter P. Burtness, for \$1,000. This sale was confirmed by the Probate Court on March 7, 1887, and on the same day Ole Peterson, as administrator, in pursuance of an order then made and so directing him, executed and delivered an administrator's deed to Burtness. On the same day Burtness gave a deed to Bradley O. Peterson, who is one of the six children of the administrator. On October 4, 1887, Bradley O. Peterson deeded the land to David H. Buttz. On April 11, 1895, Buttz deeded to G. W. Van Dusen & Co., and on December 7, 1897, the latter deeded to this defendant. All of said deeds were placed of record.

The demurrer interposed by plaintiff to the foregoing, and also

to certain other portions of the answer, to which we shall have occasion to refer later, is that they "do not state facts sufficient to constitute a defense or counterclaim, and the defendant is barred and estopped from alleging said matters, because the same have been litigated and determined in the action in which judgment was entered in the case of *Gjerstadengen v. Van Dusen*, mentioned and described in the complaint." The question as to whether the defendant is estopped from relitigating issues which were or might have been litigated and determined in the action against his immediate grantor is argued at length, and with much learning, by counsel for both parties. This question from the defendant's standpoint is entirely preliminary to a consideration of the merits of his defense. Should we conclude that he is not estopped from asserting them, the question would still remain for determination whether sufficient facts are alleged in the portions of the answer attacked by the demurrer to constitute a defense or counterclaim. Inasmuch as we have concluded that they are not sufficient we shall assume, without deciding the point, and only for the purposes of this opinion, that the defendant is in a position to avail himself of the defense he pleads, and will, therefore, consider the demurrer on its merits. It is apparent upon bare inspection that the defendant did not obtain title by virtue of the deeds which he sets forth as the source of his title. It will be noticed that the chain of title in which the conveyance to him stands begins with the estate of Olia Mikkleson. She had no title, and her estate had none. Whatever right she had under her homestead entry terminated at her death, and the title to the land, which rested in the United States government until the patent was subsequently issued, when it finally passed, passed directly not to Olia Mikkleson, or to her estate, but to her heirs individually, as new homesteaders, entirely independent of administration proceedings. Neither did the deed which Ole Peterson executed estop him, or his heirs, who are now asserting interests derived from him, from asserting title to the land in dispute. The deed executed by Ole Peterson to Burtness was executed as administrator, and without personal covenants. He did not assume to convey anything more than the estate had. In fact, the estate had no title or interest. Neither did Peterson, at the time of the execution of the deed, have title. It was more than nine months afterwards that the patent was issued which gave him title. The facts were not concealed, but were, on the contrary, open to all parties equally. It is plain that there was merely a mistake of law, which was mutual to the administrator and the purchaser, Burtness, and the Probate Court as well, in believing that the estate of Olia Mikkleson had title, whereas in fact her entire interest had ended at her death, and the title was then, and for some time thereafter, still in the United States government. We are of the opinion that the deed conveyed no title, and, further, that it cannot operate as an estoppel against the assertion of the legal title by plaintiff under such circumstances. The same facts were before this court in *Gjerstadengen v. Van Dusen*,

7 N. D. 612, 76 N. W. Rep. 233, and the same conclusion reached. Corliss, C. J., speaking for the court, said: "The facts were all matters of public record. It appeared that Olia Mikkleson had made a homestead entry on this land, but that she had not received a patent, or earned the right thereto, at the time of her death. Whether, under these circumstances, she had such an interest in the land as would make it a part of her estate on her death, was purely a question of law. Ole Peterson did not make to the purchaser any representations as to the law governing the question of title. He merely proceeded under a misapprehension as to the law, which the purchaser appears to have shared, that the land did constitute a part of the estate of the decedent, but he did not covenant that this was so. Nor does the law imply against him such a covenant. The exact reverse is the case. The law declares that the purchaser must see to it, at his peril, that the proceedings are legal, and that the land does in fact form a part of the decedent's estate." Upon the face of the deeds from which the defendant claims title it appears that no title was conveyed; further, an estoppel by deed is not made out.

There is, however, an element in the present case which did not appear in the case of *Gjerstadengen v. Van Dusen*, *supra*. In addition to the claim made in that case that Ole Peterson and his heirs are estopped by the administrator's deed from asserting title, he also claims an estoppel by conduct, and in this connection alleges that the \$1,000 which was paid to Peterson, as administrator, upon the sale to Burtness, was all received by Peterson in partial payment of a claim which he held and had filed against his mother's estate; further, that at the time of purchasing the land from Van Dusen & Co. the defendant "believed that the said Ole Peterson sold and conveyed the whole of said premises to said Burtness by a fee-simple title thereto, and that the said Peterson received the sum of one thousand dollars from such sale, and that he applied the same to the partial payment of his said claim against said Olia Mikkleson;" further, that neither Peterson nor the heirs of Olia Mikkleson have returned or offered to return said sum of \$1,000, and that he was thereby induced to purchase said premises. Do these facts constitute an estoppel in pais? We are of the opinion that they do not. The end sought to be effected is to defeat the title to land. Such a result may follow upon a proper state of facts, but only when it is necessary to prevent fraud "against which the injured party could not guard by the exercise of proper diligence." We agree with the court in *Davis v. Davis*, 26 Cal. 23, that "the doctrine of estoppel in pais should not be too readily extended when the effect of it is to divest men of their estates in lands. It should be remembered that we have a statute which makes a writing essential to the assignment or creation of an estate in real property, and that one of the objects of such statutes was to render estates secure." The rule as to the requisites of an estoppel in pais as applied to the title to realty which appeals to us as the most equitable to all parties

is that announced by Field, J., in *Boggs v. Mining Co.*, 14 Cal., on page 367. He said: "It is undoubtedly true that a party may in many instances be concluded by his declarations or conduct, which have influenced the conduct of another to his injury. The party is said in such cases to be estopped from denying the truth of his admissions. But to the application of this principle with respect to the title of property it must appear: First, that the party making the admission by his declaration or conduct was apprised of the true state of his own title; second, that he made the admission with the express intention to deceive, or with such careless and culpable negligence as to amount to constructive fraud; third, that the other party was not only destitute of all knowledge of the true state of the title, but of the means of acquiring such knowledge; and, fourth, that he relied directly upon such admission, and will be injured by allowing its truth to be disproved. * * * There must be some degree of turpitude in the conduct of a party before a court of equity will estop him from the assertion of his title; the effect of the estoppel being to forfeit his property, and transfer its enjoyment to another." This was followed and approved in *Davis v. Davis*, 26 Cal. 23, and *Smith v. Penny*, 44 Cal. 161, with the single modification of the third condition, which was held not to mean that a person must be destitute of all possible means of acquiring knowledge of the true state of the title, "but rather of all convenient and ready means to such end." Tested by this rule, the facts pleaded utterly fail to create an estoppel. Peterson was ignorant of the true state of the title when the acts set up occurred. The title was in fact then in the government. When the administrator's deed was executed, and when, as a creditor of the estate, he received payment upon his claim from moneys derived by the estate from the sale of the land, he did not own the land, and was entirely innocent of a belief that he would subsequently acquire an interest; and it is equally clear from the facts pleaded that Peterson had no intention to deceive any one either by executing the administrator's deed or by presenting his claim against the estate to the Probate Court, and receiving thereon such sums as that court undertook to distribute to creditors which were derived from the sale of property which was believed, although mistakenly, to belong to the estate. Indeed, it would appear from the facts set forth in the answer that Peterson died without learning that he acquired title to this land, for the litigation based upon that question was not commenced until 1897, and was not concluded by the decision of this court in *Gjerstadengen v. Van Dusen*, until January, 1898, which was more than five years after Peterson's death. It is extremely doubtful whether the fact that Peterson had received this money upon his account warrants the inference that he and his heirs made no claim to the title of the land from the sale of which it was derived; yet, construing it as an absolute admission that he had no title, it was an admission made without knowledge of his title, and without intent to deceive. Again, the answer contains no allegation that the defendant will suffer loss

if he is not allowed to defeat the plaintiffs' legal title by an estoppel. It is well settled that "a party setting up an estoppel must always show as an essential part of his case that he will be subjected to loss if he cannot set up the estoppel. There is no presumption in his favor. * * * An estoppel was never intended to work a positive gain to a party, but its whole office is to protect him from a loss which, but for the estoppel, he could not escape." *Bank v. Tood*, 47 Conn. 190. In view of the fact that the answer admits that the defendant received a warranty deed purporting to convey title in fee simple, and that no fact is alleged or appears which shows that his grantor is not financially responsible, we are unable to understand how the defendant will suffer loss by permitting Peterson's heirs to assert their title. On this point, see the case last cited, page 218. The estoppel in pais here set up was urged in a petition for a rehearing in this court in *Gjerstadengen v. Van Dusen*, supra, but the facts upon which it was based did not appear in the record then before the court, and was accordingly not passed upon.

The answer also alleges that Buttz made improvements on the land during the time he possessed it, which was from 1887 until 1895, consisting of breaking and backsetting, of the value of \$650, and asks that, in the event of a partition, the plaintiffs should account to the defendant for the value of such improvement. The demurrer to this claim was also sustained, and properly so. At common law, and independent of statute, a co-tenant cannot charge another with the value of improvements made by him upon the premises, unless they are made by the latter's consent. Sedg. & W. Tr. Tit. Land (2d Ed) § 711. In equity, however, in decreeing a partition of the premises, improvements made by a co-tenant may be taken into consideration, even when made without consent or promise of contribution, "provided they are necessary, useful, substantial, and permanent, enhancing the value of the estate" (see *Ward v. Ward's Heirs* [W. Va.] 21 S. E. Rep. 746, 29 L. R. A. 449, and cases cited under note "c"), and each case depends upon its own facts, and the right does not exist in all cases (*Curtis v. Poland*, 66 Tex. 511, 2 S. W. Rep. 39). The facts of this case do not appeal to us as calling for equitable interference. The improvements were not made by the defendant, but by a remote grantor,—some 10 years before the defendant's purchase; and while it may be admitted that a warranty deed may pass the claim of a co-tenant for improvements to his grantee, yet it is far from clear that such was the understanding of the parties to the various conveyances through which defendant's interest comes. Then, too, the improvements made were evidently for the exclusive benefit of the co-tenant, who made them in rendering the occupancy more valuable to him. Incidentally they may have enhanced the value of the estate. But the prime purpose in making them was to obtain personal profit, and not to increase the value of the land. Further, it appears that the party who made the improvements had the possession and use of the land and benefit of the improvements for more than seven years. It is evident that the

value of these improvements, even if they are such as could be charged to his co-tenants, is more than offset by the value of the use and occupation which he enjoyed during that period. See *Cosgriff v. Foss*, 65 Hun, 184, 19 N. Y. Supp. 941; *Scott v. Guernsey*, 48 N. Y. 106. Further, such improvements were not necessary for the preservation of the estate, and the mere fact that they enhanced the value of the common property does not entitle the tenant making them to an allowance for that value. *Elrod v. Keller*, 89 Ind. 382. The order sustaining the demurrer is affirmed. All concur.

(83 N. W. Rep. 230.)

JOHN KADLEC vs. FRANK PAVIK.

Opinion filed May 16, 1900.

Aliens—Presumption of Naturalization from Fact of Voting.

Where a party is shown to be an alien, such alienage is presumed to continue until some evidence to the contrary is produced. But proof that such party voted in this country overcomes the presumption of alienage and raises a presumption of naturalization, as the law will not presume that the party committed an unlawful act.

Proof that No Naturalization Papers Were Taken in County of Residence—Effect.

Where a foreign-born person had been in this country for 10 years, and had resided in one county in this state for 7 years, proof that he had taken out no naturalization papers in that county is no evidence that he was not a legal voter.

Declarations Against Interest of Party Making Them.

Declarations of a party that he had "voted, but had no citizen's papers," when confined to no time, place, or election, are not admissible in evidence to show that such party was not a qualified voter at a specified time and election.

Appeal from District Court, Walsh County; *Sauter, J.*

Action by John Kadlec against Frank Pavik. Judgment for plaintiff, and defendant appeals.

Reversed.

Spencer & Sinkler, for appellant.

Jeff M. Myers, for respondent.

BARTHOLOMEW, C. J. This is a contest over the office of village marshal in the Village of Pisek, in Walsh county. The election was held May 1, 1899, and a certificate of election was duly issued to the contestee by the proper canvassing board. On the trial the court found the votes to be a tie, and ordered the cancellation of the certificate of election, and that the board of canvassers reconvene and cast lots, as the statutes direct in case of a tie. The contestee appeals.

Numerous errors are assigned and argued at length, but we shall

confine ourselves to those which relate to the legality of the ballot cast by one Charles Jarus. It is claimed that this ballot was cast for contestee, and that Jarus was not a legal voter. It is clear that, granting contestant all that the trial court gave him, and all that he can claim under the evidence, yet, if he failed to establish the illegality of the ballot cast by Jarus, the contestee still has one majority. There is no conflict in the testimony on the point. The facts are that Jarus was foreign born; that he came to this country about 10 years before this election was held, and when he was about 20 years old. There was no evidence to show that he had ever denationalized himself. He had lived in Walsh county for 7 or 8 years before this election was held. The contestant showed these facts, and then showed that the records of Walsh county failed to show that he had ever declared his intention to become a citizen of this country, or received his final naturalization papers. From these facts the trial court concluded that a legal presumption arose that Jarus was not a legal voter. It is a case that rests largely upon presumptions. The alienage being shown, it is presumed to continue until evidence to the contrary is shown. *Hauenstein v. Lynham*, 100 U. S. 483, 25 L. Ed. 628. But, when it is shown that the party has cast a vote in this country, then this presumption disappears, and the opposite presumption prevails, because the law will not presume that a party has committed an unlawful act. *Gumm v. Hubbard*, 97 Mo. 311, 11 S. W. Rep. 61; *People v. Pease*, 27 N. Y. 45; *McCrary, Elec.* (4th Ed.) § § 466a, 467. True, the learned author of this work says, "The very great difficulty, however, of proving that a person has not been naturalized, would seem to require that slight proof ought to be sufficient to shift the burden." Still there must be some legal evidence to overcome the presumption of legality. Under our statute (section 479, Rev. Codes), to be a legal voter the party must be a citizen of the United States, or must have declared his intention to become such, one year, and not more than six years, prior to the time of voting. The amendment to section 121 of the state constitution does not affect this case, and we do not discuss it. But an alien may declare his intention to become a citizen before a clerk of any Supreme, Superior, Circuit, or District Court in any of the states or territories of the United States, or the District or Circuit Courts of the United States. He is not, in this respect, limited to the county or state of his residence; and after having resided in the United States for at least five years, and in the state or territory where he applies for at least one year, such alien may apply to the courts authorized to grant naturalization for his final papers. Jarus, if his declaration had been properly made, might at any time after he had been in the United States for five years, and a resident of this state for one year, have applied to the District Court in any county in this state for his final papers, and thus become a full citizen. The fact that he had not filed such declaration or made such application in Walsh county has no more probative force than would the fact that he had not made application in any other county of the state.

It may be a fact that the majority of the foreign-born residents of any county will take out their naturalization papers in the county of their residence, but that cannot overcome the fact that many go to other counties, and any and all may go to other counties if they choose. It is true, and we ought to have stated, that one witness testified that he heard Jarus say that he had voted, and had no citizen's papers. When this was, or what election was referred to, is not shown. It may have been the one in controversy. It may have been five years previous. Had these declarations been made respecting the election here in controversy, there are cases that would admit them in evidence (see *State v. Olin*, 23 Wis. 311), while other courts would reject them as hearsay (*Gilleland v. Schuyler*, 9 Kan. 569; *Davis v. State* [Tex. Sup.] 12 S. W. Rep. 957). We need not rule upon the point, as it is certain that title to office cannot be destroyed by such loose declarations as were offered in this case. We find no competent evidence upon which to declare the vote of Charles Jarus illegal. The District Court will set aside its judgment entered herein, and enter judgment dismissing the contest, with costs against the contestant. Reversed. All concur.

(83 N. W. Rep. 5.)

JAMES RIVER NATIONAL BANK vs. J. R. PURCHASE.

Opinion filed May 17, 1900.

Objection to All Evidence for Insufficiency of Complaint Must Indicate Defect.

An objection to the introduction of any evidence, upon the ground that the complaint does not state facts sufficient to constitute a cause of action, made at the opening of the trial, is insufficient in not directing attention to the particular defect in the complaint relied upon. *Chilson v. Bank*, 9 N. D. 96, 81 N. W. Rep. 33, and *Schweinber v. Elevator Co.*, 9 N. D. 113, followed.

Defects in Complaint Not Waived by Failure to Demur.

A party who fails to attack a complaint by demurrer, upon the ground that it does not state facts sufficient to constitute a cause of action, does not by such failure waive his right to urge such objection thereafter. Such right is saved by section 5272, Rev. Codes.

Practice—Defective Complaint.

The method for attacking the sufficiency of the complaint upon the grounds of insufficiency, after failure to demur, is by motion.

Improper to Dismiss Case on Objection to Evidence.

A judgment of the District Court dismissing an action, which shows upon its face that it was ordered and entered upon an objection "to the introduction of any evidence on the part of the plaintiff, for the reason that the complaint does not state facts sufficient to constitute a cause of action," is irregular, in that it is based upon no ground authorized by the statute or established rules of procedure. Such objection, being merely directed to the admission or exclusion of evidence, cannot take the place of a formal motion.

Appeal from District Court, Stutsman County; *Glaspell, J.*

Action by the James River National Bank of Jamestown against J. R. Purchase and others. Judgment for defendants, and plaintiff appeals.

Reversed.

S. E. Ellsworth, for appellant.

E. W. Thorp and *G. W. Thorp*, for respondents.

YOUNG, J. This is an appeal from a judgment rendered and entered by the District Court of Stutsman county dismissing plaintiff's case and for costs. We have reached the conclusion, from an examination of the judgment appealed from, that it must be reversed for an irregularity which appeared upon its face, which consists entirely of an error of procedure. The judgment recites that the issues of fact came on for trial at the January, 1900, term of said court; that after a jury was impaneled to try such issues a witness was sworn on behalf of the plaintiff. At this point the defendants, by their attorney, E. W. Thorp, objected "to the introduction of any evidence on the part of the plaintiff, for the reason that the complaint does not state facts sufficient to constitute a cause of action." The judgment further recites that after hearing arguments thereon "it is hereby ordered and adjudged by the court that the objection of the defendant herein be, and the same is hereby, sustained by the court, and further ordered that the above-named plaintiff's case herein be dismissed on said objection, and defendants have and recover costs and disbursements," etc. The judgment does not purport to be based upon anything else than the objection to the introduction of evidence which we have quoted. Its recitals preclude any other view, for it is expressly stated therein that it is based upon that objection, which is recited at length in the judgment. This form of an objection to evidence has been repeatedly condemned by this court as not good. *Bowman v. Eppinger*, 1 N. D. 21, 44 N. W. Rep. 1000; *Chilson v. Bank*, 9 N. D. 96, 81 N. W. Rep. 33; *Schweinber v. Elevator Co.*, 9 N. D. 113, 81 N. W. Rep. 35. In commenting on an objection couched in the same language as that in the case at bar, in the case last cited this court said: "It points out no defects in the complaint, gives the court no opportunity to order an amendment, and gives plaintiff no opportunity to amend voluntarily. At that stage of the case the court cannot stop all proceedings until it can critically examine a complaint, however long, however involved and technical, to see that it contains every required averment. If a defendant elects to defer his attack upon the pleading until the taking of testimony is reached, he must make his objection specific." Our views remain unchanged on this point. The objection interposed was bad. But had it sufficiently pointed out specific defects in the complaint, and been properly sustained, yet it would not furnish a basis for dismissing the case. The objection merely calls for a ruling upon the admission of testimony, and if the objection is sustained the case is still pending for further proceedings. If the

complaint is insufficient in some particular which is curable by amendment, the court may, in its discretion, allow an amendment. In any event, the sustaining of the objection does not authorize a summary order of dismissal of the case. It is true that the right to object to the jurisdiction of the court, and that the complaint does not state facts sufficient to constitute a cause of action, is not waived by failing to demur on those grounds. But, to make such grounds available as a basis for a judgment of dismissal, they must be presented in some form either authorized by the statute or recognized by the courts as proper procedure. The statute, while reserving the right to object to the complaint on the grounds named, is silent as to the method of attack. The method of attack recognized by the courts is by motion. The authorities all so hold. *King v. Montgomery*, 50 Cal. 115. In *Kelley v. Kriess*, 68 Cal. 210, 9 Pac. Rep. 129, the court said that, "if a complaint fails to state facts sufficient to constitute a cause of action, advantage may be taken of the defect by demurrer, by motion for judgment on the pleadings, or upon a motion for a new trial." To the same effect are *De Toro v. Robinson*, 91 Cal. 371, 27 Pac. Rep. 671; *Holcraft v. King*, 25 Ind. 352; *Tooker v. Arnoux*, 76 N. Y. 397; *Kley v. Healy*, 127 N. Y. 555, 28 N. E. Rep. 593; *Gould v. Glass*, 19 Barb. 179; *Sheridan v. Jackson*, 72 N. Y. 170; *Coffin v. Reynolds*, 37 N. Y. 640; *Smith v. Weage*, 21 Wis. 446; 6 Enc. Pl. & Prac. 875; 11 Enc. Pl. & Prac. 1044. The method of granting judgment upon the pleadings upon oral motion made at the time of trial is not, however, looked upon with favor by the courts. *Bowles v. Doble*, 11 Ore. 474, 5 Pac. Rep. 918; *Currie v. Southern Pac. Co.*, 23 Ore. 400, 31 Pac. Rep. 963; *Bank v. Meerwaldt*, 8 Wash. 630, 36 Pac. Rep. 763; *Smith v. Dennett*, 15 Minn. 81 (Gil. 59). It was said in *Holmes v. Campbell*, 12 Minn. 221 (Gil. 141), that, "on a motion for judgment on account of the insufficiency of the complaint at any stage of the case, the court will not declare the pleading fatally defective, if it can be sustained by the most liberal construction." In the case at bar the defendant did not challenge the legal sufficiency of the complaint either by demurrer or by motion. He simply objected to the introduction of evidence, and in form which we have held to be insufficient. But, as we have seen, even had it been sufficiently specific and properly sustained, it would not, nevertheless support a judgment of dismissal. No such procedure is authorized by the statute or known to the courts. For this irregularity the judgment must be reversed, and a new trial ordered. It is but just to the trial court to state that counsel for both parties treated the objection to the introduction of evidence as a demurrer to the complaint, both in the lower and in this court, and the trial court doubtless acted on it as such. But it is not so in fact. In the record before us, and upon which the case must be determined, it appears as an objection to the introduction of evidence, and nothing more. As such, it furnishes no authority to order a judgment of dismissal, either under the statute or any rule of procedure known to the courts. The District Court

is therefore directed to enter an order reversing the judgment. All concur.

(83 N. W. Rep. 7.)

JOHN WELTER *vs.* WILLIAM C. LEISTIKOW.

Opinion filed May 16, 1900.

New Trial—Inapplicable Instructions.

A verdict is properly set aside, and, a new trial granted, where the instructions were not applicable under the evidence, and tended to mislead and confuse the jury. The fact that such instructions may state correct legal propositions in no manner changes the rule.

Appeal from District Court, Walsh County; *Sauter*, J.
Action by John Welter against William C. Leistikow. Verdict for plaintiff. From an order granting a new trial, plaintiff appeals.
Affirmed.

Spencer & Sinkler, for appellant.

Swiggum & Myers, for respondent.

BARTHOLOMEW, C. J. This is an appeal from an order granting a new trial in an action tried before a jury, and in which a verdict had been returned for plaintiff. That verdict was set aside, and plaintiff appeals. There is nothing in the case to advise us upon what particular ground a new trial was granted. The motion for the same covered a multitude of grounds, but, as there was an irreconcilable conflict in the evidence, we conclude that the court based its order upon supposed errors in the instructions. Error was urged as to the greater portion of the instructions given. This action was upon an account to recover for some threshing which the plaintiff claimed to have done for defendant in 1894. The answer was a general denial.

To understand the attack made upon the instructions, some portion of the testimony must be given. Plaintiff in his examination in chief testified as follows: "I owned and operated a threshing machine during the threshing season of 1894. Did threshing for the defendant, Leistikow, on the 24th day of August of that year. Made the contract to do the threshing with Mr. Leistikow in the office of his mill, in the City of Grafton, about a week or ten days before the date mentioned. I went in there, and asked him for the job of doing his threshing. He said, 'The wheat was not quite fit to thresh yet; it was a little soft;' but he agreed to let me have the job, and said that as soon as it was ready to thresh he would let me know. The threshing was done on what was known as the 'Schuman Farm.' On the 23d day of August, 1894, Mr. Leistikow sent Mr. Hall out to me where I was threshing, on my brother's farm, and he asked me if I could get ready to go onto Mr. Leistikow's farm in the morning, and I told him, 'Yes.' He said, 'All right, I have got to go and

get teams to take the wheat from the machine,' and he drove off. Mr. Hall was at that time, I think, Mr. Leistikow's wheat buyer at the mill." On rebuttal, he reiterated as follows: "I made the bargain for this threshing myself with Mr. Leistikow in Mr. Leistikow's mill office in Grafton." The defendant testified as follows: "Know John Welter, the plaintiff. Knew him in summer and fall of 1894. There never was a word that year or any other year regarding any threshing, and when he says he saw me he simply lies. Plaintiff's father, Nicholas Welter, came to me some time in the neighborhood of the 20th to the 22d of August, 1894, and inquired if I had hired any one to do my threshing on the Schuman land. I told him I had hired John Dipple. He said, 'My machine is lying up doing nothing, and I want to get it started, and I would like your job.' I said, 'I can't give it to you, Nick, because I have promised it to John Dipple; he was here a day or two ago.' He said, 'Leistikow, I owe you a note, and can't pay it unless you let me do the threshing.' John Welter was not there at that time. I told Mr. Welter that Dipple offered to do the threshing for 8 cents, which was, I understood, the regular price; and, further, that I would have to find out first whether Dipple would relinquish me from the promise I had made him that he could do the threshing. After that I sent James Hall out to see whether Dipple would consent to let me off, because I wanted to pay the threshing, if possible, through the Welter note." This witness also testified that about 10 days after the threshing was done, at the request of Nicholas Welter, and in his presence, he indorsed the amount of the threshing account on Nicholas Welter's note. There is no other evidence whatever in the record relating to the making of any contract for the threshing. There is no claim by either party that the contract was made in any other manner. It was made by the defendant, Leistikow, in person, and the main question for the jury's determination was whether it was made with John Welter or Nicholas Welter. There is no claim in the case that there was any contract made by agent. It will be noticed that what Hall said to John Welter would be equally applicable in either case. If the contract were as John Welter testifies, it would be a notification that the wheat was ready for threshing. If the contract were as Leistikow testifies, it would be a notification that Dipple released Leistikow from the former contract. Hall testified that when he went out where the machine was running John Welter was running the engine, and he did not see Nicholas Welter. Plaintiff's testimony emphatically repudiates the idea that any contract was made at that time, or that he at any time made the contract with Hall as agent for Leistikow. It is equally certain that John Welter is not claiming under any contract made by Nicholas Welter, but for plaintiff's benefit, with Mr. Leistikow. There is, then, no possible question of agency that is at all material in this case.

The following quotations from the charge were excepted to, and the giving thereof is assigned as error: "Now, gentlemen of the jury, in this case there are a number of matters upon which the court

will charge you in reference to the question of agency, so that you may, in arriving at your verdict, know the law concerning the questions of agency, which are somewhat involved in this case." This was clearly given under a misapprehension of the testimony. And again the court said: "Now, you are instructed in this case, gentlemen of the jury, if you find that the defendant did make a contract with Nicholas Welter, the father of the plaintiff, to do the threshing, but that afterwards the plaintiff and defendant did enter into a contract, and that the contract was made with the defendant's agent, then, in that case, the plaintiff would be entitled to recover." This is a correct proposition of law, but has no application to the case. After fixing the amount of recovery under the last instruction, the court added: "Providing that you do not find that the contract was entered into between the defendant and Nicholas Welter, and that Nicholas Welter was authorized by the plaintiff in this action, John Welter, to so contract, and to hold himself out to the defendant as the owner of the machine, and made the contract with the defendant, Leistikow, to do the threshing, and you further find that the plaintiff in this action, John Welter, permitted the said Nicholas Welter to so hold himself out, then, of course, the plaintiff in this case cannot recover, providing you find that the contract was made between the defendant and Nicholas Welter." This is worse than inapplicable. It is an incorrect proposition of law, because, by indirection, it tells the jury that although Nicholas Welter made the contract, and held himself out as the owner of the machine, yet, if John Welter did not authorize him so to do, he (John) could nevertheless recover under the contract thus made. Of course, the learned trial court never intended to so instruct the jury, but the charge is clearly and easily susceptible of such construction. Doubtless, further consideration convinced the trial court that an error had been made in instructing upon this matter of agency, and for that reason a new trial was granted. The order granting a new trial is affirmed. All concur. (83 N. W. Rep. 9.)

WILLIAM M. BALLOU vs. AMUND BERGVENDSEN.

Opinion filed May 16, 1900.

Brokers—Sale of Realty—Written Authority.

A real estate broker with whom lands are listed for sale by the owner has no authority to make contracts for the sale thereof which will bind the owners, in the absence of written authority signed by such owners authorizing him to do so.

Alteration of Contract by Agent Avoids It.

A contract for the sale of land was executed by the owner, and left with his agent for the sale of such land, for delivery to the purchaser. The agent altered the instrument, by substituting the name of another person, and changed both the consideration and the rate of interest, and delivered the same to such other person. *Held*, that the contract so delivered was not the contract of the owner.

Contract Void.

Held, further, under the facts stated in the opinion, that as a new contract the agent had no authority to make it, and that it was not ratified by the owner, and is a nullity, and furnishes no justification to the person entering into possession thereunder.

Appeal from District Court, Ramsey County; *Morgan, J.*

Action by William M. Ballou against Amund Bergvendsen. Judgment for plaintiff. Defendant appeals.

Affirmed.

Siver Serumgard, for appellant.

M. H. Brennen and Brennan & Kennedy, for respondent.

YOUNG, J. This is an action of ejectment to recover the possession of a quarter section of land located in Ramsey county. The case was tried to the court without a jury. The plaintiff prevailed, and the defendant brings the case to this court for trial *de novo*. The complaint sets forth the plaintiff's ownership of the land in dispute, the unlawful entry of the defendant thereon, also damages suffered by reason thereof, and prays for judgment dispossessing the defendant. The answer admits that the plaintiff has the legal title to the land, but denies that defendant wrongfully entered into the possession of said premises, or that he holds possession unlawfully; and in this connection alleges that he took and now has possession under and by virtue of a written contract of purchase executed by plaintiff, and delivered to him by one A. M. Powell, plaintiff's duly-authorized agent, for the sale of said land; further, that, pursuant to the terms of said contract, he paid to the plaintiff, through his said agent, the sum of \$100 on the purchase price, and that plaintiff still retains the same. A copy of the contract is attached to the answer. The plaintiff replied, denying the execution of the contract; also denying that he either received or retained any portion of the purchase price of the land, or authorized his agent to do so.

The determination of the case turns entirely upon facts which are not in dispute. They are substantially these. The plaintiff owned several tracts of land in Ramsey county, among which was the tract in question. At the time the transaction involved in this case occurred he resided in Amherst, Mass. These lands were listed by him with A. M. Powell, a real estate dealer at Devils Lake. There is some evidence that he left with Powell a written memorandum of each parcel, with the price and terms of sale. No such memorandum was produced at the trial. It appears to have been lost, and oral testimony was given as to its contents, but there is no evidence that it was signed by plaintiff. The evidence shows that Powell had no written authority from plaintiff authorizing him to make contracts for the sale of his lands generally, or any such authority as to the particular tract, except as will hereafter appear. His agency was that of a real estate broker, and extended only to procuring purchasers for plaintiff's lands. In case a sale was effected, he received a commission of 5 per cent. on the purchase price. The plaintiff fixed

the price, rate of interest, time and terms of payment, and executed all contracts personally, and reserved the right of rejecting any proposed sale. In January, 1898, Powell found a probable purchaser for this particular tract in one Frank Fuller. In accordance with his course of dealing with plaintiff, he prepared duplicate contracts, which were made by using printed forms, and writing in the names of the parties, consideration, rate of interest, description of land, and other details necessary to make them represent the contract agreed upon; and on January 29, 1898, sent the same to the plaintiff to be executed, with an accompanying letter, explaining the financial standing of Fuller, the proposed purchaser. The sale to Fuller was approved by plaintiff, and on February 5, 1898, he signed the contracts, and returned them to Powell for completion, by obtaining a cash payment of \$100, which was provided for in the contract, and by securing Fuller's signature to the same. When these blanks were returned to Powell, the name of Frank Fuller was written in as party of the second part. The consideration to be paid by Fuller, which was \$950, was also written in ink, as well as the rate of interest on deferred payments, which was 7 per cent. For some reason Fuller did not sign the contracts or complete the purchase. A number of letters were sent by plaintiff to Powell, inquiring whether the sale to Fuller had been consummated, but no reply was received. On March 3, 1898, he wrote: "Is it the case that the contract with Fuller is completed? I have another inquiry for that tract in case Fuller has not signed the contract." On March 14, 1898, the plaintiff wrote Powell as follows: "I am in receipt of a telegram from Mr. Roberts definitely accepting, as I understand it, an offer that I made him on the Belgrade place (which is the land in suit) when in Devils Lake last fall, viz: the same price at which I listed it with you. This new phase that the matter has taken makes it still more important to return the contract prepared for Fuller, even than when I wrote my two last letters. I infer that he cannot have signed it." This letter was not received by Powell until March 17th. On March 12th, prior thereto, one E. T. Moen, an employe of Powell's, made an oral agreement for a sale of the land to this defendant. The terms differed from those which plaintiff had made for Fuller in several particulars. Two days later Powell, in pursuance of the oral agreement of his employe, Moen, delivered to the defendant the alleged contract upon which he bases his defense. The latter at the same time paid Powell \$100 on the purchase price, and under the authority of such contract took possession of the premises. This contract, which was signed by defendant in duplicate, bears the signature of both the plaintiff and the defendant. It is not, however, plaintiff's contract. It appears that Moen, Powell's employe and under his direction, took the Fuller contracts, which Powell still had in his possession, and by erasures and interlineations altered the same in such particulars as were necessary to make it conform to the terms agreed upon with the defendant. Fuller's name was scratched out, and that of the defendant written in. The considera-

tion was changed from \$950 to \$925, and the rate of interest from 7 to 8 per cent. Whether the defendant was present when the erasures were made is not certain, but it is clear that he knew that the contract as he signed it had not been forwarded to Powell by the plaintiff in the form he signed it, for a sufficient time had not elapsed—but two days from the date of his oral agreement—to enable Powell to transmit the terms of the proposed sale to plaintiff in Massachusetts and get the contract back. This, however, is not material. One copy of this alleged contract with defendant was mailed to the plaintiff by Powell on March 15th, together with a draft for \$53.50, which was the amount of the cash payment, less his commission, together with a letter stating that the Fuller deal had fallen through, and that he had closed a deal with the defendant. Plaintiff immediately returned the contract and draft to Powell, and refused to ratify the transaction. Powell sent them back, and explained that he had executed it in good faith, and requested a ratification of the sale. Plaintiff again returned the papers, and has positively and at all times denied Powell's authority to make the contract, and has likewise refused to ratify it. When advised that the defendant had taken possession under the contract, and was making improvements, he at once, and on April 19, 1898, wrote the defendant as follows: "I have to notify you that in placing buildings upon my land in Morris township, or in any way attempting to occupy the land, you are trespassing upon property where you have no right. I have never authorized any one to give you any claim upon it. Mr. Powell has asked me to ratify an agreement which he says that he has arranged with you, and has sent me a contract of sale, in which your name has been substituted for Frank Fuller's, for whom I prepared and signed the contract of sale last winter. I refuse to recognize such a document as that, and have returned to Mr. Powell a draft which he tendered me, stating that it was from you. It will be necessary for you to vacate the premises, and refrain from further trespassing."

The trial court found "that before making any improvements on said land the defendant had due notice from the plaintiff that plaintiff disallowed and disaffirmed said contract, and refused to acknowledge the same, or ratify the acts of said A. M. Powell in the premises." This finding of fact is challenged by appellant, and our examination of the evidence leads us to the conclusion that it is not supported. But we do not deem it a material fact in the determination of the case; for it is apparent that, if the defendant had a valid contract of purchase, his entry and possession was lawful, and if, on the other hand, the contract was invalid, he was a trespasser *ab initio*. Possession under an instrument which is a nullity gives no rights, save by ratification; and in this case there was no ratification, but the most prompt and emphatic disavowal. The sole question, then, is this: Is the contract under which defendant justifies his possession a valid contract? A negative answer must be given to this question. This being a contract for the sale of real

property, it is essential to its validity that it be signed by the vendor personally, or by an agent who is authorized to execute it, by written authority subscribed by the vendor. Rev. Codes, § 3887, subd. 5. When the two instruments referred to were sent to Powell, they covered all the details of the sale to Fuller, and lacked only the latter's signature to make the sale to him complete. When altered, and delivered to the defendant, the vendee, consideration and rate of interest were different. It is patent that this was not plaintiff's contract. He had executed no such contract; neither, as we have seen, did he ratify it. So far as it depends on the plaintiff individually, it is no more than a forgery. The alterations changed its character entirely, and if it has any validity it must of necessity be as a new contract, and one resting for its validity upon the authority of Powell to make it; for there is no pretense that the plaintiff acted personally in making the alterations, or even that he was aware that they had been made until he received the contract by mail. Defendant contends that Powell did have authority as plaintiff's agent to make a binding contract of sale. A complete answer to this would be that no such contract is relied upon. The instrument which defendant sets up to justify his possession purports to be a contract executed by the plaintiff personally, and not one executed by Powell as plaintiff's agent. However, had it purported to have been executed by plaintiff through Powell as agent, still it would be a nullity; for Powell was without the requisite written authority to make a contract for the plaintiff. His authority was merely that of a real estate broker. It is well settled that their authority does not extend to binding their principals by contracts of sale, but merely to procuring purchasers for the property listed with them, who will be acceptable to the owners. *Coleman v. Garrigues*, 18 Barb. 60; *Glentworth v. Luther*, 21 Barb. 145; *Morris v. Ruddy*, 20 N. J. Eq. 236; *Duffy v. Hobson*, 40 Cal. 240; *Armstrong v. Lowe*, 76 Cal. 616, 18 Pac. Rep. 758; *Siebold v. Davis*, 67 Ia. 560, 25 N. W. Rep. 778; *Stewart v. Pickering*, 73 Ia. 652, 35 N. W. Rep. 690. In *Halsey v. Monteiro* (Va.) 24 S. E. Rep. 258, the court said: "A real estate broker or agent is defined to be one who negotiates the sale of real property. His business generally is only to find a purchaser who is willing to buy the land upon the terms fixed by the owner. He has no authority to bind his principal by signing a contract of sale. A sale of real estate involves many things besides fixing the price. The delivery of the possession has to be settled; generally, the title to be examined; and the conveyance, with its covenants, to be agreed upon and executed by the owner,—all of which require conference and time for their completion. They are for the determination of the owner, and do not pertain to the duties, and are not within the authority, of a real estate agent. For obvious reasons, therefore, the law wisely withholds from him any implied authority to sign a contract of sale on behalf of his principal." See, also, *Holmes v. Redhead*

(Ia.) 73 N. W. Rep. 878; *Everman v. Herndon* (Miss.) 15 South. Rep. 135; and as to alterations, *Walsh v. Hunt* (Cal.) 42 Pac. Rep. 115, 39 L. R. A. 697. We accordingly hold that the instrument which the defendant received from Powell was a mere nullity. It was not executed by the plaintiff; neither was it authorized or ratified by him. It therefore furnishes no authority or justification for defendant's entry upon the premises. If he has been misled, and shall suffer loss, it is not chargeable to the plaintiff. His recourse must be against those who are the direct cause of it, namely, the persons who imposed upon him a spurious contract. The judgment of the District Court is affirmed. All concur.
(83 N. W. Rep. 10.)

A. B. McDONALD vs. NORDYKE MARMON COMPANY.

Opinion filed May 17, 1900.

Mortgage Foreclosure—Notice.

Section 5848, Rev. Codes 1895, construed, and *held*, that a notice of mortgage foreclosure sale by advertisement, which was published 40 days and no longer,—such publication being first made on January 14th, and the sale being made February 23d,—was legally published

Six Successive Weeks.

Under said section, notices are required to be published "six times, once in each week, for six successive weeks." When these provisions are complied with, there will be no occasion to consider periods of time, whether computed by days or weeks. *Finlayson v. Peterson*, 5 N. D. 587, 67 N. W. Rep. 953, 33 L. R. A. 532, construing Comp. Laws, § 5414, distinguished.

Appeal from District Court, Towner County; *Morgan, J.*

Action by A. B. McDonald against the Nordyke Marmon Company and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Frank D. Davis (*Newman, Spalding & Stambaugh*), for appellant.

The mortgage pleaded cannot be foreclosed by advertisement. §§ 4699, 5844, Rev. Codes. The complaint is sufficient. It alleges that plaintiff made to defendant a mortgage. The power of sale is no part of the mortgage. Plaintiff need only state so much of the contract sued upon as makes prima facie a right of action, and if any other part furnishes the means of defeating the action, it is a means of defense. Bliss on Code Pleading, § 202. The publication of notice was insufficient, and the foreclosure was void. *Finlayson v. Peterson*, 5 N. D. 587. Section 5848, Rev. Codes, requires forty-two days to elapse between the first publication and the day of sale. *Finlayson v. Peterson*, 5 N. D. 587. It is claimed that § 5143, Rev. Codes, changes the statute in question and is controlling, and operates to shorten the time of publication. The statute construed in the

Finlayson case was enacted in 1889 and repealed in 1895 (Rev. Codes repeals paragraph 11) and re-enacted in § 5143. In order to uphold the judgment in the case at bar, this section must operate to shorten the time of publication from forty-two to forty days. The clause in § 5143, Rev. Codes, under consideration, is not a legislative construction, but a new and independent provision, changing § 5848 as construed by this court, and to permit such provision to shorten the time for publication under § 5848, Rev. Codes, as already construed, would be to allow an indirect amendment of § 5848. It cannot be given such an effect. § 64 Const. Section 5143 must then be construed as a legislative construction of the word "weeks" as found in § 5848. As such it is not binding on the court, being an exercise of judicial power. *Cooley*, Const. Lim. (6th Ed.) 113; *Dash v. Van Kleeck*, 7 Johns. 508. Legislative construction, while entitled to weight, will not be permitted to change the clear and unambiguous language of the previous statute, or the previous adjudication of the courts upon such statute. This is unanimously held with reference to the executive construction of statutes. *U. S. v. Dickson*, 14 Pet. 141; *U. S. v. Graham*, 110 U. S. 219; *Merritt v. Cameron*, 137 U. S. 542; *Wisconsin Ry. Co. v. U. S.*, 164 U. S. 190; *Travelers' Ins. Co. v. Fricke*, 94 Wis. 258, 68 N. W. Rep. 961; *Pearson v. Cornell*, 54 Neb. 647, 75 N. W. Rep. 25.

Siver Serumgard (*Cochrane & Corliss* on oral argument), for respondents.

WALLIN, J. This action was brought to annul a sheriff's certificate of sale, and to enjoin the delivery of a sheriff's deed pursuant to such sale. Said certificate was delivered to the defendant corporation by the defendant Currie, as sheriff, who sold the real estate described in the certificate at a mortgage foreclosure sale made by advertisement. The mortgage was given by the plaintiff to said corporation, and plaintiff alleges that said foreclosure sale so operates as to cast a cloud upon plaintiff's title to the premises, and that said title will be still further clouded if the delivery of such sheriff's deed is made, and the deed is recorded. Plaintiff alleges that said foreclosure sale was wholly void, because the sale was made upon insufficient notice. This feature of the case is as follows: "That on or about the 15th day of January, 1897, said defendant Nordyke Marmon Company commenced proceedings to foreclose said mortgage by advertisement. That the first publication of the notice of sale under said foreclosure proceedings was made on the 14th day of January, 1897, and that the date of sale contained in said notice and the sale of said property was made on the 23d day of February, 1897. The said mortgagee, in foreclosing said mortgage, failed and neglected to publish said notice of sale for the period of time prescribed by law, and that by reason thereof said foreclosure was wholly void." The complaint was demurred to by the defendants upon the ground that it failed to state facts sufficient to constitute a cause of

action. The District Court sustained the demurrer, and pursuant thereto judgment was entered dismissing the action, with costs.

The order sustaining the demurrer is assigned as error, and the ultimate question for determination is whether the notice of sale was legally published. No claim is made that the notice was not published six times, or that it was not published once in each week for six successive weeks. The only criticism upon the publication made by counsel is that the period of time elapsing between the date of the first publication, January 14th, and the date of sale, February 23d, is insufficient in length. This period is exactly 40 days, when computed by excluding the first date and including the last. A decision of the case will require a construction of the statute regulating the publication of such notices at the time the publication was made. The governing statute is embraced in section 5848 of the Revised Codes of 1895, which reads: "Notice that the mortgage will be foreclosed by a sale of the mortgaged premises or some part thereof must be given by publishing the same six times, once in each week for six successive weeks in a newspaper of the county where the premises intended to be sold, or some part thereof, are situated, if there is one, and if not, then in some newspaper published at the seat of government." This court has not hitherto had occasion to put a construction upon this provision of the Code. It is true that in *Finlayson v. Peterson*, 5 N. D. 587, 67 N. W. Rep. 953, 33 L. R. A. 532, a somewhat similar section of the Code—that embraced in section 5414 of the compiled Laws—was carefully considered and construed by a unanimous opinion of the court, and counsel for the appellant now contend that the decision cited must control the disposition of this case. But we think the case cited is not at all decisive of the question presented here, and is not in point, for the reason that the statute regulating the publication of the notice here in question is materially different from that found in section 5414 of the Compiled Laws, which, as we have said, was the statute construed in the case cited. In construing the earlier enactment we said, in effect, that the requirement that notice should be given "by publishing the same for six successive weeks, at least once in each week," meant that such notice must be published weekly "for" and "throughout" a period of 6 full and consecutive weeks, and embracing an aggregate of 42 days' time, and nothing short of 42 days would satisfy the statutory mandate. We think the construction placed upon section 5414 of the Compiled Laws was a proper one, and it is probable that we should adhere to the same if again called upon to construe the same provision; but that statute has been superseded by section 5848 of the Revised Codes, and the latter is the governing statute. A perusal of this section of the Code, which we have quoted at length, will disclose the fact that the period or duration of the publication, which was the decisive test under the earlier law, has ceased to be controlling under the existing enactment. In testing the validity of any publication of a notice under the present

law, one controlling factor is the number of the publications. The notice must be published "six times." Another controlling factor is that such publications must appear once in each week for six successive weeks. We are of the opinion that the purpose of the legislature in passing the present statute was to cure and get rid of a practical difficulty which presented itself in all attempts to foreclose by advertisement under the old law. Under the old statute, six publications of the notice would satisfy the statute in some cases, and in others nothing less than seven would suffice to render the publication legal. Which number would suffice in any case would be controlled by the date of the first publication and the sale, after excluding the date of the first publication. The uncertainty as well as practical inconvenience which confronted the practitioner who attempted a foreclosure by advertisement under the former law is swept away under the existing statute. Periods of time are all subordinated to other considerations, which have already been pointed out. Under the present law the notice is required to be published before the sale "six times, once in each week for six successive weeks." When this is done, there need be made no perplexing computations of days or weeks. Our conclusion is that the trial court did not err in sustaining the demurrer to the complaint. The judgment will be affirmed. All the judges concurring.

(83 N. W. Rep. 6.)

A. B. McDONALD vs. GEORGE W. BEATTY, *et al.*

Opinion filed May 17, 1900.

Statement of Case—Settlement After Time.

In this case, after the entry of judgment, counsel for the appellant served upon counsel for respondents a proposed statement of the case to which no proposed amendments were ever served. About one year after the service of said proposed statement, and long after the statutory period for settling the case had run, the trial court settled and allowed a statement of the case in this action, which statement differed in vital particulars from the proposed statement served upon counsel for the respondents. Pursuant to notice, counsel for respondents appeared before the District Court at the time of the settlement and allowance of the statement, and then and there filed written objections to the settlement of such statement or any statement herein, for the reason, among others, that the time allowed for such settlement had expired, and that no cause for an extension of time had ever been shown to the court; which written objections were supported by affidavit to the effect that no cause for an extension had ever been brought to the knowledge of respondents' counsel by notice or otherwise, and that counsel knew of no cause. No attempt was made to show cause by the appellant's counsel, and no reason for extending time was stated by the trial court, but, on the contrary, the statement was settled without showing cause, or attempting to do so. In this court a motion to strike the statement from the record upon the grounds above set out was granted. Under the circumstances stated, we hold that the fact that no cause for an extension was shown appeared affirmatively upon the record, and in such cases no power to extend time exists in the trial court.

When Time to Settle Case Begins to Run.

Section 5467, Rev. Codes, construed, and *held* that, in cases where no proposed amendments are served to a proposed statement of the case, the statute allows 20 days within which the statement may be settled without an extension of time. Said period of 20 days begins to run at the expiration of the time allowed by statute for the service of such proposed amendments.

Judgment Upon Findings.

Upon consideration of the findings of the trial court, *held*, that the judgment entered below was fully justified by such findings.

Appeal from District Court, Towner County; *Morgan, J.*

Action by A. B. McDonald against George W. Beatty and Alice L. Beatty. Judgment for defendants, and plaintiff appeals. Affirmed.

John Burke and Frank Davis (Newman, Spalding & Stambaugh, of counsel), for appellant.

Cochrane & Corliss, for respondents.

WALLIN, J. This action was instituted in April, 1897, and was tried, in December of that year, before the court without a jury. The findings were filed in July, 1898, and judgment was entered in favor of the defendants in October, 1898. The record shows that appellant's counsel served a proposed statement of the case on respondents' counsel on the 18th day of December, 1898, and that no other proposed statement was at any time served on the respondents' counsel in this case. On December 2, 1899, upon notice given to respondents' counsel, the appellant applied to the trial court for the settlement and allowance of the statement of the case as served on December 18, 1898. No proposed amendments to the proposed statement were ever served. The trial court, on said 2d day of December, 1899, proceeded to settle a statement of the case, which statement forms a part of the record transmitted to this court. The statement so settled and transmitted differed in its structure and constituent elements from said proposed statement served on the respondents' counsel in divers respects, and particularly in this that the proposed statement embodied only a version of the evidence reduced to a narrative form, while the statement actually settled and allowed consisted of a rescript of the evidence and proceedings as embodied in the stenographer's report of the trial. At the time said statement was settled (December 2, 1899) the parties, respectively, were represented by counsel, and the respondents' counsel then interposed certain objections to the settlement and allowance of the statement, which objections were embodied in written form, and submitted to the District Court in that form. In connection with said written objections, and as a part thereof, an affidavit of respondents' counsel was also submitted. After hearing counsel in support of said objections and in opposition thereto, an order was made by the District Court overruling the objections. This order was excepted to by counsel for the respondents, whereupon the court allowed the

exception, and by its order brought all of said motion papers and orders thereon upon the record, and the same are incorporated with the statement of the case. All of said orders made in connection with said objections to the settlement of the statement were dated and signed on the 2d day of December, 1899, and on the same day the District Court settled and allowed the statement by a separate order. When the case was reached in this court a preliminary motion was submitted by counsel for the respondents to strike the statement of the case from the record transmitted to this court. The motion was based upon the record, and was made upon all the grounds set forth in the motion papers which were submitted to the District Court, and which objections were overruled by that court as already stated. The written objections found in the record are numerous, and the affidavit of respondents' counsel filed with the same is of considerable length, but for the purpose of disposing of the motion in this court we shall have occasion to consider but one of the several grounds urged by counsel in support of the motion.

The record shows that after the entry of judgment, and in December, 1898, counsel for appellant served a proposed statement of the case upon the respondents' counsel, and that the statement of the case in the record was settled and allowed by the District Court about one year thereafter, and in December, 1899. Among respondents' objections to such settlement, as embodied in the written objections submitted to the court below, was one to the effect that long prior to the date of the settlement of the statement the period allowed by statute for so doing had run and expired, and that no extension of time had ever been given, either by consent of counsel or by order of court; and, further, that no cause for extending time had ever been brought to the knowledge of respondents' counsel by notice or otherwise; and, finally, that no cause for extending time had been at any time shown to the District Court. As has been seen, all of these objections were expressly overruled by the court below, and the statement was settled despite said objections. The settlement of the case operated as an extension of time (*Johnson v. Railway Co.*, 1 N. D. 354, 48 N. W. Rep. 227); and the question presented is whether the District Court can in such cases, against objection, extend time, in the absence of cause shown for so doing. This question must be answered in the negative. The statute, although exceptionally liberal, does not go so far as to allow time to be extended in such cases without cause and against objection. On the contrary, the statute fixes a condition precedent to such extension. The time can only be extended for good cause shown and in furtherance of justice. Rev. Codes, § 5477. The discretion to extend time is a reviewable discretion. *Moe v. Railroad Co.*, 2 N. D. 282, 50 N. W. Rep. 715. It is also true that where no objection is made in the court below that this court will conclusively presume that good cause was shown for the extension of time, and where cause is attempted to be shown this court will apply a liberal rule, favorable to the discretion

exercised in the court below. See *Gardner v. Gardner* (Mich.; decided at the present term) 82 N. W. Rep. 522.

In the case at bar we are dealing with an extension of time made against objection, and in the absence of any cause shown for such extension. In the written objections and affidavit filed in the court below counsel for respondents not only opposed an extension of time, but most explicitly called the attention of the trial court to the fact that the time allowed by statute had run, and, further, that no cause for an extension had been shown by appellant's counsel. In response to this challenge counsel for the appellant did not proceed to show cause, or, at least, did not then or at any time bring upon the record any cause whatever for an extension of time; nor did the trial court by its order indicate that any cause was shown, nor suggest that cause for an extension existed within the personal knowledge of the court or judge or elsewhere. Under the circumstances shown in this case, we think counsel for appellant was bound to come forward and show cause for an extension, and, if the cause consisted of facts which were within the personal knowledge of the court or presiding judge, such facts were bound to be disclosed and brought upon the record, to the end that they might be discussed by counsel in the court below and in this court, in the event of a review by this court. Our conclusion is that the learned trial court, under the circumstances of this case, was devoid of authority to extend time and settle the statement. The motion to strike the statement from the record is therefore granted.

Counsel for appellant contend that under section 5467, Rev. Codes, where, as in this case, no amendments are served to a proposed statement, the moving party is not restricted by statute as to time, and consequently that the plaintiff in this case had no need of an extension, and in fact did not ask for or obtain an extension, of time. This position is taken despite the fact that on December 2, 1899, nearly one year had elapsed after the service of the proposed statement, and that the judgment at that time had been entered more than a year. The argument on the statute is this: When the proposed statement is served the other party has 20 days in which to prepare and serve amendments to such statement. The statute then continues: "The proposed statement and amendments must within twenty days thereafter be presented by the party seeking the settlement thereof to the judge who has tried or heard the case upon five days' notice to the adverse party." It is urged that it is only when amendments are proposed that this last limit of 20 days applies. But that seems to us a forced construction. The remainder of the section tends to explain the meaning. It continues: "If no amendments are served, or if served allowed, the proposed statement may be presented with the amendment, if any, to the judge for settlement without notice to the adverse party." It seems clear to us that the 20-days limitation applies equally whether amendments are proposed or not. But in the latter case no 5 days' notice need be

given. Application can be made to the judge *ex parte*, and on the next day after the time for serving proposed amendments expires, and it must be made within 20 days. The statute continues: "If the judge is absent from the district when the proposed statement [not statement and amendment] should be presented to him for settlement, the time of such absence shall not be deemed any portion of the time herein limited for the settlement thereof." We are clear that this language applies to all cases where statements must be settled. The construction contended for would not only leave the time of settlement where no amendments are proposed without limit, but would, we think, open the door to unnecessary and vexatious delays in the administration of the law.

The statement of the case which embraced the evidence being thus eliminated from the record, there remains for our consideration only the judgment roll proper, which includes the pleadings, the findings of the trial court, and the judgment. The question, therefore, which we are to determine is whether, upon the issues as framed by the pleadings, the court erred in entering the judgment which was entered. Upon this record, of course, no trial anew in this court, within the meaning of the statute, is now practicable.

The action was brought to foreclose a mortgage upon real estate given to plaintiff by the defendants, and dated on the 15th day of January, 1896; said mortgage covering land outside of a certain mill property, to be hereafter referred to. The mortgage purported to secure the payment of three promissory notes,—one for \$1,000, dated December 1, 1895, and two for \$2,250, each dated November 15, 1895. The two notes last mentioned matured in 1898 and 1899, respectively. The note for \$1,000 fell due by its terms January 1, 1896. The default alleged in the complaint was for the nonpayment of the \$1,000 note, which plaintiff alleges is wholly unpaid, except certain amounts paid thereon in the month of February, 1896, aggregating \$128.13. The defendants answered, denying the allegations of the complaint, except that they admit that they gave the notes, and executed and delivered the mortgage, as described in the complaint. Further answering, and as an affirmative defense, and as a basis of counterclaim, defendants aver that on and prior to the 15th day of November, 1895, the plaintiff represented to these defendants that he (the plaintiff) was the owner in fee simple of certain mill property, described in a certain contract signed on said date by the plaintiff and the defendant George W. Beatty, a copy of which contract is embraced in the answer, and that the plaintiff would transfer said mill property to the defendant for the price of \$10,000.

The contract referred to is prolix, and we shall only set out its substantial features, and these in brief. The plaintiff, by the contract, covenanted with the defendant George W. Beatty to execute and deliver to Beatty a deed of warranty of certain mill property, being the Cando Roller Mill, situated at Cando, in this state, for

an agreed consideration of \$10,000, and the contract admitted the receipt by plaintiff of an installment of \$500 paid on said consideration. The contract further declared that such deed of warranty was only to be delivered to said George W. Beatty upon the condition that Beatty should perform certain covenants resting upon him, which covenants were specifically set out in the instrument and made conditions precedent. The covenants in the contract made binding upon Beatty were grouped under three heads, and were numbered, respectively, "first," "second," "third." The first covenant required Beatty to pay the additional sum of \$9,500 for the mill property, such payment to be made in installments, to be evidenced by a series of five notes, described in the contract, and falling due at divers dates, and aggregating \$9,500. Said covenant numbered "first" also required George W. Beatty to secure the \$1,000 note described in the complaint, which was one of the series, by a chattel mortgage covering a quantity of grain in granaries situated upon land described in the instrument. The covenant numbered "second" reads as follows: "To assume the payment of two notes, of two thousand dollars each, made payable to the Nordyke & Marmon Company, secured by mortgage on the mill property above described." The notes and mortgage last above mentioned were pre-existing incumbrances upon the mill property. The covenant in the contract numbered "third" bound George W. Beatty to secure said purchase price by a mortgage upon the mill property in question, and, as further security, to execute and deliver to plaintiff a real estate first mortgage upon certain outside real estate described in the contract. The contract embraces the following additional provision: "Said party of the second part to pay all taxes and assessments on said land for the year 1895, and subsequent years, and to repay them to said party of the first part if he shall have to pay them, with twelve per cent. interest per annum for each year's tax as damages until paid."

A persual of the last-mentioned paragraph of the contract, when read in connection with the entire instrument, makes it clear that it was not intended to be a covenant which Beatty was required to perform as a condition precedent to a delivery of a deed of warranty. In the first place, it is a separate and independent paragraph of the contract, and does not appear to belong under either of the three covenants which are expressly declared to be conditions precedent. Again, this paragraph does not require the payment of 1895 taxes upon the mill property especially, but requires that such tax be paid on "said land;" referring, we think, to each and all the several tracts of land upon which Beatty had obligated himself to give a mortgage to plaintiff. Again, this feature of the contract bound George W. Beatty to pay all subsequent taxes upon said land, and contained a stipulation for liquidated damages if Beatty did not pay such taxes, and the same were paid by the plaintiff. In the nature of things, it could not have been intended that the stipulation

to pay all subsequent taxes should be a condition precedent to the delivery of the deed, and yet such would be the absurd result of holding that this feature embraced covenants intended to be conditions precedent. The paragraph quoted binds Beatty to pay the subsequent taxes quite as firmly as to pay the tax of 1895. We think the manifest purpose of this part of the instrument was to enable the creditor, in the event of the nonpayment of taxes by the debtor, to pay the same himself, and to reimburse himself therefor by a rate of interest in excess of the legal rate recoverable in the absence of special contract. For these reasons, and others which need not be mentioned, we shall hold that this part of the contract did not embrace a covenant intended to be or which was a condition precedent to the delivery of the warranty deed; nor does the contract embrace covenants, other than those referred to, which are binding upon the purchaser of the mill property as conditions precedent or otherwise.

The answer further avers that said George W. Beatty, besides making said cash payment of \$500, duly performed all of the said covenants resting upon him to be performed, and the performance of which, under the contract, were conditions precedent to the delivery of said deed, and did execute and deliver to plaintiff notes and mortgages which were accepted by plaintiff, and which notes and mortgages have ever since been retained, and that plaintiff did assume and agree to pay said two notes of \$2,000 each, which were secured by said pre-existing mortgage upon the mill property. The answer further shows that at the time of the performance of said covenants resting upon the defendant George W. Beatty, as above recited, that said defendant demanded of the plaintiff a delivery of a deed of warranty of said mill property as stipulated in said contract; and that subsequent to such demand, and on or about March 30, 1896, said defendant made another demand upon the plaintiff for such deed of warranty, which was not complied with, and that a final demand for a deed was made on or about April 15, 1896; and that plaintiff has at all times neglected and refused to deliver such deed. The answer alleges that at the time said first demand was made upon the plaintiff, and of plaintiff's refusal to comply therewith, the defendant George W. Beatty notified the plaintiff that he would refuse to comply with his covenants under the contract with respect to making payments thereunder until such time as the plaintiff should perform on his part by a delivery of the deed; and that when said final demand was made, on or about April 15, 1896, and upon plaintiff's refusal to comply with the same, said Beatty then and there offered to surrender to plaintiff any and all of his rights under the contract, and then and there rescinded said contract, and notified the plaintiff of such rescission, and that the same was made upon the ground of a total failure on the part of the plaintiff to perform his covenant with respect to the delivery of a deed of the mill property; and defendant then and there de-

manded a return of his said papers delivered to the plaintiff, as before set out. The answer further charges that at the time said contract was entered into the plaintiff was not the owner of said mill property, and never thereafter became the owner thereof, and further alleged that the plaintiff is wholly insolvent. The answer demanded a dismissal of the action, with costs; and, as affirmative relief, that the contract in question be canceled and adjudged to be void, and that plaintiff be required to surrender up said notes, and execute proper releases of said mortgages, and that the plaintiff be enjoined from selling or transferring said notes, and that judgment be entered in defendants' favor for damages in the sum of \$500, with interest from and after the date of said contract. The judgment as entered in the District Court in all respects corresponds with this demand for judgment, except that no money damages were awarded to the defendants.

To the defendants' said answer the plaintiff served a reply containing a qualified denial of the new matter in the answer. Plaintiff, by his reply, admits the execution of the contract pleaded in the answer, and the payment of \$500 upon the consideration as stated in the answer, and further admits the execution and delivery of the mortgages to the plaintiff as stated in the answer. Plaintiff further alleges that he caused to be executed a good and sufficient deed of warranty, and had the same in his possession, at or about the time said mortgages were delivered, and at that time showed the same to George W. Beatty, and informed him that the same would be delivered to him upon the full performance of the covenants to be performed by him, the said Beatty; and further alleges that plaintiff is ready and willing to perform his part of said contract by a delivery of such deed, and will deliver the deed when said defendant shall perform the covenants resting upon the defendant; and the plaintiff avers that he brings the deed into court for delivery upon a compliance by the defendant with the said covenants binding upon the defendant. The reply does not aver that plaintiff at any time delivered, or offered to deliver, said deed unconditionally to the defendant; but, on the contrary, states and sets out two, and only two, grounds or reasons why the defendant, from plaintiff's standpoint, is not entitled to a delivery of the deed. The first of said grounds is an allegation that the defendant has not paid the taxes on said mill property for the year 1895 and subsequent years, although such payments have been often demanded of the defendant. The second ground is an allegation to the effect that the defendant had not paid the said notes secured by said pre-existing mortgage on the mill property which he, the defendant, had assumed and agreed to pay, and that one of said notes matured on November 1, 1896, and, not being paid, the said mortgage securing the same was foreclosed on account of the nonpayment of such note, and said mill property was sold at such foreclosure sale on the 23d day of February, 1897. The reply neither alleges nor suggests any

other grounds or reasons for plaintiff's neglect to deliver such deed of warranty.

In our opinion, the grounds of plaintiff's refusal, as stated in his reply and above set forth, are wholly inadequate. We have already shown that the payment of taxes for the year 1895 and subsequent years was not and could not have been a condition precedent to a delivery of the deed, and we are likewise clear that the default in paying the note, which did not, by its terms, mature until about one month after the contract was signed, was not intended to be a condition precedent to a delivery of the deed. The payment of said pre-existing notes had been duly and promptly assumed by the defendant, and such assumption constituted a full performance of defendant's covenant with respect to said notes, as stated in the contract. The contract did bind the defendant to assume and agree to pay the notes, and this was a condition precedent to a delivery of the deed, but the actual payment of the notes was not made such a condition. We therefore find no facts pleaded in the reply which will justify the plaintiff's neglect to deliver the deed in question to the defendant.

Turning to the findings of fact as made by the District Court, we discover that the same are all in defendant's favor, and that such findings fully sustain the allegations of the answer. The findings are too long to be set out in this opinion. We shall only summarize their most salient features. The court found that at the time said contract was made said plaintiff was not the owner of the mill property; that plaintiff had not been the owner at any time since the contract was made; that the defendant paid down \$500 upon the execution of the contract, and that the defendant executed and delivered the notes and mortgages required of the defendant; that said mortgage on the outside real estate was not a first mortgage, as was agreed for, but that in lieu of the same the plaintiff accepted said real estate mortgage in connection with certain chattel security, as stated in the findings; and that defendant assumed the payment of the two notes secured by the pre-existing mortgage on the mill property. The court further finds that the plaintiff at no time prior to the trial offered to deliver the deed, but at all times neglected and refused so to do; that upon the execution and delivery of the papers to plaintiff, as above stated, the defendant demanded the delivery of a deed of the plaintiff, and plaintiff then refused to comply with said demand, and gave as a reason therefor that the taxes of 1894 had not been paid, and the defendant had not insured the property; that the defendant then and there notified plaintiff that he, the defendant, would not further comply with said contract until the deed was delivered. It is further found that defendant demanded such deed of plaintiff after a full compliance on his part with all the conditions of the contract binding upon the defendant, and that such demand was not complied with; that on or about April 15, 1896, said George W. Beatty

rescinded said contract, and notified plaintiff thereof, and then and there offered to surrender to plaintiff the possession of the mill property, and then and there tendered plaintiff the possession, and vacated the mill premises, and informed the plaintiff that defendant rescinded said contract upon the ground and for the reason that the plaintiff refused to perform on his part, and had not delivered the deed; that, in connection with said rescission of the contract, the defendant demanded a return to him of all the said notes and mortgages and other papers which he had delivered to the plaintiff under the contract. We find nothing in the contract of sale requiring the defendant to pay the taxes of 1894, or to insure the mill property, and certainly nothing requiring the defendant to do either as a prerequisite to a delivery of the deed.

It appears that some of the mortgages were not delivered at the time agreed upon, and that the first note falling due has not been paid in full when it fell due; but as to these defaults they appear to have been condoned by the plaintiff. It is undisputed that plaintiff accepted and retained all the notes and mortgages delivered to him by defendant under said contract, and that plaintiff, after the maturity of the first note, accepted two payments from the defendant, and indorsed the same on said first note. Under such circumstances, the plaintiff is not in a position to say, and in fact does not say, that the defendant is not entitled to a deed on account of default in the matter of delay here under consideration.

The claim is now made that plaintiff was not bound by his contract to deliver the deed until the entire consideration was paid, the last installment of which became due in November, 1899. We cannot so interpret the contract, especially in view of the fact that the defendant was bound to and did mortgage the mill property back to the plaintiff as security for the purchase money. Until the deed was delivered to defendant, his mortgage thereon would have been without value to the plaintiff and without binding force as a mortgage. No such result of the transaction can reasonably be supposed to have been intended by the plaintiff. This point is especially important in view of the fact that the sale contract itself did not operate to convey to defendant any estate or title to the mill property, either legal or equitable, for the reason that the plaintiff, who assumed to sell the property, did not own the same at the time he signed the sale contract or at any time thereafter. Under such circumstances, a deed from the owner was an essential prerequisite to the execution of any valid mortgage on the property by the defendant.

Moreover, it is our opinion that any ambiguity which may inhere in the language of the contract with respect to the time at which the deed was required to be delivered is wholly removed by the interpretation placed upon this feature of the instrument by both of the parties thereto. That the defendant supposed when he executed and delivered his papers to plaintiff that he was then entitled to the deed

has not been questioned, and his repeated demands for the deed demonstrate that he considered his right to the deed clear and unassailable.

Turning to the plaintiff's side of the case, we find that the plaintiff, by his own pleading, has brought upon the record conclusive evidence that he (the plaintiff) did not so construe the contract as to permit him to withhold the deed until the consideration for the mill property should be paid in full. The reply not only makes no such claim, but, on the contrary, shows that the plaintiff made out a deed and showed it to George W. Beatty at the time the latter delivered his papers to the plaintiff, and that at Beatty's request the plaintiff had another deed of the property executed, wherein Beatty's wife was the grantee, and that the plaintiff then informed Beatty that the said other deed was ready, and would be delivered upon the performance of the covenants resting upon the defendant; and the reply shows, further, as do the findings, that the plaintiff brought such deed into court, and at the trial tendered a delivery of it to defendant upon the same terms. The findings show that plaintiff's refusal to deliver the deed was based wholly upon the matter of taxes, insurance, and certain other matters of minor consequence, and these, as well as the averments contained in the reply, show that plaintiff never contended before the trial that he was at liberty to withhold the deed until the price was fully paid. This practical construction of the instrument with regard to the time at which the parties understood that the deed was to be delivered under the contract must forever silence the claim that it was not to be delivered until the property was paid for. We think it unnecessary to pursue the subject further. Our conclusion is that the judgment of the District Court should be affirmed, and this court will so direct. All the judges concurring.

(83 N. W. Rep. 224.)

DAKOTA INVESTMENT COMPANY, *et al* vs. TIMOTHY SULLIVAN.

Opinion filed May 22, 1900.

Order Confirming Execution Sale Appealable.

An order of court confirming an execution sale of real estate is a final, appealable order.

Order Confirming Sale Cannot be Assailed by Motion.

Such order is in the nature of an adjudication, and cures all defects and irregularities in the proceedings, and cannot subsequently be attacked by motion in the case to set the same aside by reason of such defects and irregularities.

Appeal from District Court, Walsh County; *Sauter, J.*

Action by the Dakota Investment Company and others against Timothy Sullivan and others. Judgment for plaintiffs. After sale on execution, J. W. Boeing moved to set aside the sale. W. J.

Hewitt, who held the record title to a portion of the land sold, appealed from an order setting it aside.

Reversed.

DePuy & DePuy, for appellant.

Gray & McMurchie, for respondents.

BARTHOLOMEW, C. J. On the 29th day of January, 1897, an execution was duly issued by the clerk of the District Court of Walsh county upon a judgment theretofore duly and regularly entered in said court in favor of the Dakota Investment Company and against Timothy Sullivan. The judgment was dated October 25, 1889. Such proceedings were had under the execution that on March 15, 1897, the sheriff of said county sold certain real estate in said county that belonged to said Sullivan at the time of the entry of judgment, and upon which the judgment was a lien. The property consisted of four town lots,—two adjoining lots in one block, and two adjoining lots in another block. The lots in each block were sold to different purchasers. On the 16th day of March, 1897, the sale was duly confirmed. There is no claim made that there was any fraud used in obtaining this confirmation, or that there was any accident or surprise upon the part of any interested party. On July 8, 1899 (being more than two years after the order confirming the sale was entered), one J. W. Boeing, who had become interested in a portion of the land sold, as assignee of the sheriff's certificate of sale, gave notice of a motion to set aside the said sheriff's sale, and to cancel and annul the satisfaction of judgment theretofore entered, and to have the lien of the judgment re-established and another sale ordered. This notice was served upon the parties to the original action, the purchasers at the sheriff's sale and one William J. Hewitt, who held the record title to a portion of the land through conveyances from Sullivan. Hewitt alone appeared and opposed the motion. The relief asked in the motion was in part granted, and Hewitt appeals.

The first error assigned reads, "The court erred in entertaining a motion on the part of respondent to vacate the sale." We shall rule the case upon this assignment. We first consider the grounds upon which the motion was based, and in doing so we must look at the grounds set forth in a prior motion made by Hewitt, as they are referred to and made the basis in part for this motion. When the judgment was rendered, section 5111, Comp. Laws, was in force, under which an execution could not issue upon a judgment after five years from its rendition, without leave of court; and this could be had only upon a showing that the judgment, or some portion thereof, remained unpaid. In other words, the law raised a disputable presumption of payment after five years. No leave of court was obtained in this case, although the execution was not issued until seven years after the rendition of judgment. This is urged as ground for setting aside the sale. But section 5111, Comp. Laws,

was omitted from the Revised Codes of 1895, and at the time the execution was issued there was no limit thereon, save the life of the judgment. True, the five years from the rendition of the judgment had expired before section 5111, Comp. Laws, was repealed; but a disputable presumption is a mere matter or rule of evidence, in which a party can have no vested right, and which may be changed at the will of the legislature. The rule having been swept away, no leave of court was necessary when the writ issued. But, if necessary, its omission was an irregularity only, and did not render the sale void. In 8 Enc. Pl. & Prac. 360, it is said, "An execution issued after the lapse of more than a year and a day after judgment, without revival by *scire facias*, or after the lapse of the statutory period, without taking the steps prescribed by statute, is voidable merely, and not void, and all acts done under it before it is set aside are valid." An immense array of cases is cited in the notes to support the text.

The other objections to the sale relate to the time for which the property was advertised, and the sale of two lots for a lump sum; that is to say, irregularities on the part of the officer conducting the sale. In this state, execution sales of real estate must be confirmed by the court whence the execution issued. Section 5539, Rev. Codes. As already stated, the sale was duly confirmed in this case, and this attack is made nearly two years after confirmation. In 12 Am. & Eng. Enc. L. 219, it is said: "In confirming the sale, the court decides on its legality; and this adjudication supplies all defects in the proceedings, except in case of fraud or lack of jurisdiction." In Kleber, Void Jud. & Ex. Sales, 387, it is said: "Where execution sales are required by statute to be confirmed, the same rule then applies to them as is applicable to judicial sales, namely, that in the absence of fraud the order of confirmation cures all defects and irregularities in the sale, and the purchaser acquires all the title of the judgment debtor. Objections to the sale for errors and irregularities not of a jurisdictional nature must be urged before confirmation, or else they are too late." In *Brown v. Gilmor's Ex'rs*, 8 Md. 322, the sale was attacked by motion after confirmation, or, as it is there termed, "ratification." After disposing of certain objections relating to the transfer of the case from one court to another, the court said: "Unless, therefore, there was some other cause which prevented the purchaser from making his objections to the ratification of the sale within the time limited by the order *nisi*, such as misrepresentation, surprise, or fraud on the part of the trustees or other parties interested, the ratification by the Superior Court of Baltimore must be regarded as final and conclusive." In Freeman on Executions (section 311) it is said: "Such objections to a sale as can be asserted in that manner ought to be made by opposition to its confirmation; for, if not made thus, or if made thus and overruled, the order of confirmation seems to have the

force of a judgment, and to estop the parties from any collateral assertion of the alleged irregularities." In *Kincaid v. Tutt*, 88 Ky. 396, 11 S. W. Rep. 299, the court said: "So, the judgment of confirmation being distinct from the judgment on the cause of action, and final, it follows that it cannot be vacated after the term of court at which it was rendered." *Watson v. Tromble*, 33 Neb. 450, 50 N. W. Rep. 331, was an action in equity to set aside a sale by reason of irregularities in the appraisement. The court said: "The plaintiff, Watson, was a party to the foreclosure suit, and should have urged his objections to the appraisement before the confirmation of sale. No excuse is given for his not having done so, nor is there any charge of fraud or collusion. No fraud being alleged, it must be held that the order of confirmation cured all defects and errors in the appraisement and sale, and that the purchaser acquired all the title of the judgment debtor in the property,"—citing *Neligh v. Keene*, 16 Neb. 407, 20 N. W. Rep. 277, and *Wilcox v. Ruben*, 24 Neb. 368, 38 N. W. Rep. 844. And see, also, *Hotchkiss v. Cutting*, 14 Minn. 537 (Gil. 408); *Real Estate Co. v. Hendrix*, 28 Ore. 485, 42 Pac. Rep. 514; *McRae v. Daviner*, 8 Ore. 63; *Dawson v. Litsey*, 10 Bush, 408; *Crawford v. Tuller*, 35 Mich. 57; *Bank v. Peter*, 13 Bush, 591; *Thomas v. Davidson*, 76 Va. 338; *Bank v. Neel*, 53 Ark. 110, 13 S. W. Rep. 700.

The order of confirmation, being a final order made upon summary application in an action after judgment; affecting a substantial right, is appealable, under the express provisions of section 5626, Rev. Codes, and such an order has been held a final, appealable order. *Bank v. Neel*, supra; *Hammond v. Cailleaud*, 111 Cal. 206, 43 Pac. Rep. 607; *Yerby v. Hill*, 16 Tex. 377; *Hirshfield v. Davis*, 43 Tex. 155. If respondent was in any manner aggrieved by the order of confirmation, his remedy was by an appeal therefrom. Having failed to appeal, he is forever precluded from attacking the judgment of confirmation on the ground of irregularities. This application was made by one not a party to the action. We have assumed that he could attend the sale in a proper manner, but must not be understood as so deciding. The court was without authority to entertain the motion on the grounds alleged, and the order from which the appeal is taken must be reversed. All concur.

(83 N. W. Rep. 233.)

FRANKLIN S. DALRYMPLE, *et al* vs. THE SECURITY LOAN & TRUST COMPANY.

Opinion filed May 22, 1900.

Action to Quiet Title—Who May Maintain.

The rule prevailing in courts of chancery which required the plaintiff, in suits brought to quiet title, to show both possession and

legal title in himself, is abrogated in this state by statute. Such action may be maintained by a plaintiff who has "an estate or interest in real property," whether legal or equitable. Rev. Codes, § 5904.

The Beneficial Owner of Land May Sue to Quiet Title.

Where, under the direction of a purchaser paying the consideration, real estate is conveyed by the vendor to a stranger, who is named as grantee in a deed absolute on its face, which grantee nevertheless receives the deed in trust for the sole use and benefit of parties not named in the deed, such parties are the beneficiaries under the deed, and as such are seised of the entire title. Such parties are in a position to maintain an action to quiet the title to such real estate. Rev. Codes, § § 3381, 3383, 3386.

Judgments Not Liens.

Under the facts set out in the complaint and considered in the opinion, *held*, that it does not appear from the complaint that certain judgments referred to in the complaint are liens upon the title to the real estate in controversy.

Joint Demurrer by Several Defendants for Insufficiency.

Held, further, where the complaint in an action against several defendants states a cause of action as against either of the defendants, that a joint demurrer to the complaint for insufficiency is properly overruled.

Joint Demurrer for Defect of Parties Defendant.

Held, further, that a joint demurrer to a complaint upon the ground of a defect of parties defendant will be overruled if the action can be maintained, without prejudice as to the rights of any one defendant, without bringing in new parties.

No New Parties Necessary.

Held, further, that the demurrer of the defendants made jointly to the complaint for a defect of parties defendant was properly overruled for the reason that upon the facts pleaded the interests of the defendants did not require the bringing in of additional parties to the action.

Action by Guardian—Averment of Representative Capacity—Demurrer.

Held, further, that where an action is brought in behalf of minors by their guardian it is incumbent upon the guardian to set out facts in an issuable form, in his complaint, which show his representative capacity and the character in which he sues; and a complaint in such a case which does not do so is demurrable. But such demurrer must be special, and upon the ground of want of capacity to sue, and, unless so made, such objection is waived.

Voluntary Transfer—Fraudulent Intent.

Where it appears from the complaint that the father of the plaintiffs, upon a consideration paid by him, caused a deed conveying real estate to be made to D. in trust for the sole use and benefit of his children, and that the father was in debt at the time, and that certain creditors had obtained and docketed judgments against him, *held*, that such facts alone, in the absence of allegations of the father's insolvency, or of a fraudulent intent upon the part of the father, do not show that such transfer of real estate was necessarily fraudulent. Hence the same cannot be held to be constructively fraudulent. A fraudulent intent in the transfer of real estate must be made to appear in order to justify a court in setting the conveyance aside as fraudulent as to creditors. Rev. Codes 1895, § 5055.

Appeal from District Court, Cass County; *Lauder, J.*, presiding by request.

Action by Franklyn S. Dalrymple and others against the Security Loan & Trust Company of Casselton and others. Judgment for plaintiffs. Defendants appeal.

Affirmed.

Pollock & Scott, for appellants.

The object of an action to remove a cloud upon title, and to quiet the possession of real estate, is to protect the owner of the legal title from being disturbed in his possession or title. Hence, title in the plaintiff is of the essence of the right to relief, and plaintiff must prevail, if at all, upon the strength of his own title. If plaintiff has no title, he cannot successfully invoke the aid of a court of equity to remove a cloud from such non-existing title. *Evenson v. Webster*, 5 S. D. 266, 58 N. W. Rep. 669; *Kitts v. Austin*, 83 Cal. 167; *Ordway v. Cowles*, 45 Kan. 450; *Dick v. Foraker*, 155 U. S. 414; *Frost v. Spitley*, 121 U. S. 552; *San Francisco v. Ellis*, 54 Cal. 72; *Myrick v. Comsalle*, 19 N. W. Rep. 129; *Jellison v. Halloran*, 42 N. W. Rep. 392. Such title should be exhibited by conveyances or instruments of record, the construction of which will expressly rest with the court. *Halland v. Challen*, 110 U. S. 15. The complaint admits that plaintiffs are out of possession of the premises and that the same are in the adverse possession of one of the defendants. John C. Dalrymple not having been made a party defendant, and thus given an opportunity to defend or disaffirm his prima facie title, he cannot in this action be dispossessed of the same, and until he has been dispossessed no title can be established in plaintiffs, and they cannot maintain an action to quiet title. *Frost v. Spitley*, 121 U. S. 552, 30 L. Ed. 1010; *Russell v. Gregg*, 113 U. S. 550, 28 L. Ed. 993; *Jackson v. LaMoure County*, 1 N. D. 238, 46 N. W. Rep. 449; *Thomas v. White*, 2 Ohio St. 548. That the contract, an executory agreement for the conveyance of land, not having disclosed any agency or trusteeship on the part of O. C. Dalrymple, all persons claiming under him are estopped to claim title as against defendants, who are innocent purchasers and incumbrancers of the property. §§ 3587, 3528, 3540, 3594, and 3549, Rev. Codes; *Blum v. Schwartz*, 16 L. R. A. 668. The complaint does not allege that plaintiffs are infants, or that at the commencement of the action O. C. Dalrymple was the appointed guardian of the estates of the plaintiffs, or that he prosecutes in the capacity of guardian. These are material and necessary facts to be stated. *Hulbert v. Young*, 13 How. Pr. 414; *Grantman v. Thrall*, 44 Barb. 173; *Stanley v. Chappell*, 8 Cowan, 235; *Polly v. Ry. Co.*, 9 Barb. 449; *Crawford v. Neal*, 56 Cal. 321; §§ 6538, 6540, Rev. Codes. The fact that O. C. Dalrymple is the father of plaintiffs and their guardian by nature confers no rights upon him as to their estates. *Johnson v. Waterhouse*, 11 L. R. A. 440; *Miles v. Kagler*, 10 Am. Dec. 426; *May v. Calder*, 2 Mass.

55; *Williams v. Storrs*, 6 Johns. Ch. 357. The naming of a guardian *ad litem* in the title will not take the place of an averment of his appointment. *Jones v. Steele*, 36 Mo. 324. In this form of action all persons who have, or claim to have, or appear to have, any interest or lien in or upon the land adverse to the plaintiffs, should be made defendants. *Thompson v. McCorkle*, 136 Ind. 484; *Ellis v. Ry. Co.*, 77 Wis. 114; *Kincade v. McGowan*, 88 Ky. 91; *Johnson v. Robinson*, 30 Minn. 170; *Keene v. Galen*, 24 Neb. 317. In suits by persons claiming under a trust, the trustee in whom the legal title is vested should be made a party. *McCormick v. McCormick*, 5 S. W. Rep. 573; *O'Hara v. McConnell*, 93 U. S. 150; *Champlin v. Champlin*, 4 Edw. Ch. 228; *Dunn v. Seamore*, 11 N. J. Eq. 220.

Newman, Spalding & Stambaugh, for respondents.

This action is governed by the provision of § 5904, Rev. Codes. *Dick v. Foraker*, 155 U. S. 414; *Holland v. Challen*, 110 U. S. 15. By this section an action may be maintained by any person having an estate or interest in real property against another who claims an estate or interest adverse to him. Under this statute any person may bring such an action; legal title is not necessary in the plaintiff for the maintenance thereof. *Tuffree v. Phlms*, 41 Pac. Rep. 806. Section 5486, Rev. Codes, authorizing the court in actions of this character to decree a transfer of the title would be meaningless unless it was the intention of the Code to permit the action to be maintained by one who has not the legal title. The conveyance to John C. Dalrymple conveyed to plaintiffs the title which the Cass County Bank obtained by its foreclosure. §§ 3381, 3383, Rev. Codes; *Smith v. Security Trust Co.*, 8 N. D. 451, 79 N. W. Rep. 981. Necessary party defendants are those without whom no decree at all can be rendered. *Pomeroy*, Rem. & R. R. § 330.

WALLIN, J. The complaint in this action, after stating that said defendants the Security Loan & Trust Company and the Cass County Bank are corporations, alleges the following facts in substance: That in the month of March, 1883, one Isabella C. Dalrymple and said Oliver C. Dalrymple were husband and wife. That at said date said Isabella C. Dalrymple became and was the owner of lots numbered, respectively, 3 and 4 of block 20 in the town (now city) of Casselton, in Cass county, N. D. That said premises at that time, and continuously thereafter and until the death of said Isabella C. Dalrymple, were occupied by the deceased and her family as their homestead. That said Isabella C. Dalrymple died in the month of May, 1891, leaving surviving her said husband and certain minor heirs, whose names appear in the title of this action; also one other minor heir, since deceased, named Howard C. Dalrymple, and all of whom were the children of said Isabella C. and Oliver C. Dalrymple. That in October, 1885, said husband and wife executed and delivered a certain mortgage upon said premises to secure the sum of \$2,689.46, which mortgage was recorded. This mortgage was made to the

Security Loan & Trust Company. That on October 2, 1889, said Isabella C. Dalrymple was the owner of a certain half section of land described in the complaint, and situate in said County of Cass, and on said day said husband and wife joined in a conveyance by quitclaim deed of said half section of land and said homestead premises to said defendant the Cass County Bank, which deed was made to secure the payment of a then existing indebtedness of said Oliver C. Dalrymple to said bank in the sum of \$13,444, and further to secure any advances which should thereafter be made by said Cass County Bank to said Oliver C. Dalrymple; and to further secure such indebtedness and advances said Oliver C. Dalrymple and his said wife executed and delivered to said bank their certain other quitclaim deed covering a large amount of real estate situated in said County of Cass, and more particularly described in the complaint. It is further stated in the complaint that on April 24, 1893, an accounting was had between said bank and said Oliver C. Dalrymple, whereby it was ascertained that said Dalrymple was indebted to said bank in the sum of \$21,248.64, for which said bank held said quitclaim deeds as security. Paragraphs 10, 12, 13, and 14 of the complaint are as follows:

"(10) That thereafter, and on or about the 24th day of April, 1893, for the purpose of paying the said indebtedness of the said Oliver C. Dalrymple to the said defendant Cass County Bank, to-wit: the sum of twenty-one thousand two hundred and forty-eight dollars and sixty-four cents (\$21,248.64), and for the further purpose of assuring and securing to the said Franklin S. Dalrymple, Howard C. Dalrymple, John C. Dalrymple, and Gertrude C. Dalrymple, minor heirs of the said Isabella C. Dalrymple, the full value of all their right, title, interest, and estate of, in, and to all said real property, the said Oliver C. Dalrymple made and entered into a contract with the said defendant Cass County Bank in his own name, but in behalf and for the benefit of himself and said minor heirs of said Isabella C. Dalrymple, a copy of which is hereto annexed, marked 'Exhibit A,' and made a part of this complaint. That in and by the terms of said contract it was agreed that for the purpose of carrying out said contract the said Oliver C. Dalrymple should at once secure from the County Court of said Cass county letters of guardianship for said minor heirs of said Isabella C. Dalrymple, and that thereupon said Cass County Bank should bring an action or actions to foreclose its lien under said quitclaim deeds upon all said real property, which said real property was, under and by the terms of said agreement, to be sold upon judgments obtained in said actions for the foreclosure of said liens as aforesaid to satisfy the said indebtedness of the said Oliver C. Dalrymple to the said Cass County Bank. That as a part of the consideration for said agreement said defendant Cass County Bank agreed to pay the said Oliver C. Dalrymple the sum of one thousand dollars; and that upon the sale of said property as aforesaid under said judg-

ment the entire indebtedness of the said Oliver C. Dalrymple to the said Cass County Bank should be satisfied and canceled; and that thereupon the said bank, whenever its title under said foreclosure proceedings to said lots three and four in said block twenty should be perfected and made complete, would convey said lots by special warranty deed free and clear from all incumbrances to the said Oliver C. Dalrymple, or such other person as he should designate to take the title thereto (in trust for said minor heirs of said Isabella C. Dalrymple). That thereafter, pursuant to said agreement, the said Oliver C. Dalrymple made application to the said County Court of the said Cass county for appointment as guardian of the said minor heirs of the said Isabella C. Dalrymple, and such proceedings were thereafter had in said court that on the 21st day of June, 1893, the said Oliver C. Dalrymple was appointed guardian of the persons and estates of the said minor heirs of the said Isabella C. Dalrymple, to-wit: Franklin S. Dalrymple, Howard C. Dalrymple, John C. Dalrymple, and Gertrude C. Dalrymple. That thereafter, pursuant to said agreement, said Cass County Bank commenced an action in said court for the foreclosure of its said liens upon said real estate, wherein the said Cass County Bank was plaintiff and the said Oliver C. Dalrymple and the minor heirs of the said Isabella C. Dalrymple were defendants, and such proceedings were therein had that thereafter, and on or about the 15th day of December, 1898, a judgment and decree were given and rendered in said action, and duly entered and docketed therein in the office of the clerk of this court in and for the said County of Cass, which, among other things, directed the sale of all said real property hereinbefore described to satisfy said indebtedness of the said Oliver C. Dalrymple to the said Cass County Bank for the payment of which the said land was held by the said bank as security, and thereafter, and after the entering and docketing of the said judgment as aforesaid, an execution was issued thereon to the sheriff of said Cass county, directing him to sell said real estate pursuant to said judgment, and the same was thereafter, and on the 29th day of January, 1895, sold, pursuant to said judgment and decree, and at said sale was purchased by said defendant Cass County Bank, and a sheriff's certificate of said sale issued to said Cass County Bank therefor. That no redemption from said sale was made of said lots three and four in said block twenty, and on the 3d day of April, 1896, the sheriff of said Cass county, pursuant to said sale and the certificate thereof, made, executed, and delivered to said defendant Cass County Bank a sheriff's deed of said lots, which said deed was filed for record in the office of the register of deeds within and for the said County of Cass on the 4th day of April, 1896, and was recorded in said office in Book 53 of Deeds, at page 326."

"(12) That thereafter, and on or about the 8th day of April, 1896, the said Cass County Bank, pursuant to said agreement hereto attached, marked 'Exhibit A,' and to the direction and instruction of

the said Oliver C. Dalrymple, made, executed, and delivered to John C. Dalrymple, who is the uncle of the said minor heirs of said Isabella C. Dalrymple and had therefore been appointed in the state of Pennsylvania by the courts thereof having jurisdiction in the matter as guardian of the estate of said minors in said state, a special warranty deed conveying to said John C. Dalrymple said lots three and four, in the said block twenty of the First addition to Casselton, as aforesaid, which said deed and conveyance was so as aforesaid made to said John C. Dalrymple for the purpose of conveying the said premises to the said John C. Dalrymple, to be held by him in trust for the use and benefit of the said surviving heirs of the said Isabella C. Dalrymple, and not otherwise; but said deed was absolute in form, and no trust was therein declared or established, and no trust in relation to said premises was declared or established by any instrument in writing signed by the said John C. Dalrymple.

"(13) That the shares, estates, and interests of the said minor heirs of the said Isabella C. Dalrymple in all said real property hereinbefore described, other than said lots three and four, was greater than the entire value of the interest of the said Oliver C. Dalrymple in said lots three and four, and it was the intention and object of said written agreement Exhibit A to secure to and ultimately vest in the said minor heirs of the said Isabella C. Dalrymple the absolute title of all said lots three and four in lieu of their interests and estates in said other real property hereinbefore described.

"(14) That after the death of the said Isabella C. Dalrymple, as aforesaid, the said Oliver C. Dalrymple, her husband, with the said minor children of the said Isabella C. Dalrymple, continued to possess and occupy said lots three and four in said block 20, as aforesaid, as their homestead, and said lots still continue to be the homestead of the said Oliver C. Dalrymple and of the said surviving minor heirs of the said Isabella C. Dalrymple."

The complaint further shows that between the month of August, 1889, and the month of October, 1896, said defendants Meredith, Lyons, Baldwin, Bagamiel, Neyhart, Justice, and Hosford severally obtained and docketed judgments in the County of Cass against said Oliver C. Dalrymple; and it is further alleged that said defendant Meredith caused an execution to issue on his said judgment, and pursuant to a sale thereunder made by the sheriff of said county of said lots 3 and 4 a certificate of sale describing said lots was made, and delivered to said Meredith; and further alleges that said defendant Lyons issued execution upon his judgment, and said lots 3 and 4 were sold at execution sale, and the usual sheriff's certificate describing said lots was delivered to said defendant Lyons as purchaser at such sale. The complaint further charges that said defendants claim that their respective judgments are liens and incumbrances upon the title of said premises, and that defendants have threatened to institute legal proceedings to enforce such liens; and that said defendants Meredith and Lyons claim that said sheriff's

certificates of execution sale issued and delivered to them respectively constitute liens upon the title to said lots. The complaint also charges that the defendant H. G. Scott is in possession of said premises under some arrangement made between said Scott and Meredith, the nature of which is unknown to the plaintiffs.

A summary of the written contract between said Oliver C. Dalrymple and said Cass County Bank, embodying its most salient features, having been set out in the complaint, as already stated, we shall omit setting out the contract in full. The relief prayed for by plaintiffs may be epitomized as follows: First, that the title to said lots 3 and 4 may be quieted, and adjudged to be in said minor heirs of Isabella C. Dalrymple; second, that said mortgage upon said lots executed by said Isabella C. Dalrymple and her husband in the month of October, 1885, may be adjudged fully paid, and directing that said mortgage may be satisfied of record by said Security Loan & Trust Company; third, that each of said judgments be declared not to be liens on the title of said lots 3 and 4, and that each of said certificates of execution sale be adjudged void, and be canceled, and vacated of record, and that the sheriff of said County of Cass be enjoined from issuing deeds upon such sales or either of them; and, finally, that said defendant H. G. Scott be adjudged to hold said premises as the tenant at will of these plaintiffs, and be directed to account for and pay over to plaintiffs the reasonable value of the rents and profits of said premises during his occupation thereof; and to this was added a prayer for general relief in equity.

To this complaint the defendants joined in a demurrer, and assigned two grounds of demurrer, viz: that the complaint does not state facts sufficient to constitute a cause of action; and, secondly, that there is a defect of parties defendant. The demurrer was overruled by the District Court, and defendants appeal to this court from the order overruling the same.

In support of their demurrer counsel for the defendants contend, first, that the sole object of this action is to quiet the title to said lots 3 and 4 by a judgment of a court of equity removing certain alleged clouds upon the plaintiffs' title, and, proceeding upon this assumption, counsel claim that such an action can be maintained only by a party who is seised of a legal title to real estate, and that the facts stated in the complaint show that the minor heirs of Isabella C. Dalrymple who are the plaintiffs are not seised of such title, and that one John C. Dalrymple is the owner of the legal title, and became such owner by warranty deed duly recorded, which deed was executed and delivered to him by the defendant the Cass County Bank. It is our opinion that this contention of counsel is untenable. In the first place, the assumption that the sole object of the action is to quiet plaintiffs' title by removing clouds thereon is refuted both by the averments of fact in the complaint and by its prayer for relief. It is true that one object of the action is to quiet title by removing certain alleged clouds thereon, but it is equally true that at

least two other objects are sought to be attained by the action. These objects are as follows: First, to invoke the aid of injunction to prevent the casting of any additional clouds upon plaintiffs' title by the delivery of sheriff's deeds pursuant to the execution sales of said property made by the sheriff of Cass county; second, to obtain an accounting with the occupant of the premises, said defendant H. G. Scott, and to secure a money judgment against Scott for the value of the use of the property. Under the complaint, if title should be quieted in the plaintiffs, they would also, in our opinion, be entitled to amend their prayer by asking for the possession of the premises in question. See Rev. Codes, § 5907; *Kitts v. Austin*, 83 Cal. 167, 23 Pac. Rep. 290. Nor can we assent to the proposition that legal title in plaintiff is essential in this state to a recovery in an action when brought for the sole purpose of quieting title. Such, undoubtedly, was the rule in courts of chancery, and under the rule in chancery possession by the plaintiff was likewise requisite to a recovery. *Frost v. Spitley*, 121 U. S. 552, 7 Sup. Ct. Rep. 1129, 30 L. Ed. 1010; *Dick v. Foraker*, 155 U. S. 404, 15 Sup. Ct. Rep. 124, 39 L. Ed. 201. But under the existing statutes in this state (Rev. Codes, § § 5904, 5486) an action to quiet title may be maintained by any person "having an estate or interest in real property" against another "who claims an estate or interest adverse to him." It is entirely clear that the phrase "estate or interest" includes both legal and equitable estates and interests, and under a recent statute a mere lien, if acquired under tax sales, may be considered and passed upon in such an action. *McHenry v. Kidder Co.*, 8 N. D. 413, 79 N. W. 875. It follows that, if this action were brought for the sole purpose of removing clouds and quieting title, plaintiffs would be in a position to institute the action if they could show either a legal title or equitable interest in the premises in question.

But defendants' counsel very earnestly make the further contention that the facts as set out in the complaint operate in law to negative either a legal title or an equitable interest in the plaintiffs. In support of this proposition it is claimed that the complaint shows that said John C. Dalrymple, long prior to the commencement of this action, became seised and still is seised of a legal title to the premises, and that such title was acquired under a deed of warranty executed and delivered to him by the Cass County Bank as grantor, which bank was, at and prior to the delivery of such deed, the fee-simple owner of the premises. It will be conceded that the Cass County Bank, at and before it delivered said deed, had the absolute title. Such title was acquired by a decree of foreclosure, the validity of which is not questioned. But the question presented is whether it is true, under the facts stated in the complaint, that said John C. Dalrymple received said deed without consideration moving from him, taking the same as a mere trustee for the use and benefit of Oliver C. Dalrymple. To ascertain what the rights of John C. Dalrymple are under said deed of warranty, recourse must be had to the facts

as pleaded. We learn from the complaint that said deed was absolute on its face, and contained no reference to any trust; and that no trust in relation to said premises was ever declared or established by any instrument in writing signed by the said John C. Dalrymple; but the complaint nevertheless alleges that said John C. Dalrymple is the uncle of said minor heirs, and that he had theretofore been appointed by the proper court in the State of Pennsylvania the guardian of the estate of said minor heirs situated in said state; and the complaint further states that "said deed and conveyance was so as aforesaid made to said John C. Dalrymple for the purpose of conveying the said premises to the said John C. Dalrymple, to be held by him in trust for the use and benefit of the said surviving heirs of the said Isabella C. Dalrymple, and not otherwise." From this statement in the complaint it appears conclusively for the purposes of the demurrer that said deed of warranty to John C. Dalrymple was received by him as a trustee of the premises in question, and that the plaintiffs are the beneficiaries under such deed. A trust of this nature arises by operation of law under a well-recognized equitable doctrine, which is voiced by section 3386 of the Revised Codes, which reads: "When a transfer of real property is made to one person and the consideration therefor is paid by or for another a trust is presumed to result in favor of the person by or for whom such payment is made." Under the deed no duty is devolved upon the grantee in such deed, nor is there a suggestion in the complaint that John C. Dalrymple, as trustee or otherwise, is required to do any act in connection with his said trust. The result is, under the statute, that a mere nominal or dry trust is created by said deed of warranty. Said deed operates, under the statutes, to vest the entire title and estate in the beneficiaries. This precise question arose in a recent case decided by this court, in which this identical property was involved. *Smith v. Trust Co.*, 8 N. D. 451, 79 N. W. Rep. 981. We make reference to that case as conclusive upon the question as to the effect of the deed under the facts as pleaded here, and it follows that the plaintiffs in this action, under the operation of the deed, have as beneficiaries a status of title and ownership which enables them to institute an action either to quiet title or for any purpose relating to said real estate or its title. But defendants have demurred also upon the ground that there is a defect of parties defendant. They do not, by their demurrer, however, name any party who is not, but should be, joined as a defendant in the action. Under some authorities this omission alone would defeat this branch of the demurrer. See *Baker v. Hawkins*, 29 Wis. 576; *Gardner v. Fisher*, 87 Ind. 369. But, as there is some conflict of opinion upon this question, we shall pass the point over in this case without deciding the same. See *Hudson v. Archer*, 4 S. D. 128, 55 N. W. Rep. 1099. There is, however, unanimity in the decisions to the effect that a demurrer for defect of parties cannot be sustained unless the "demurrant has an interest in having the omitted party joined, or that

he is prejudiced by the nonjoinder." See Bliss, Code Pl. § 298, and cases cited in note "c"; also 6 Enc. Pl. & Prac. p. 311.

Turning to the brief of defendants' counsel we find that counsel call the attention of the court to the fact that neither Oliver C. nor John C. Dalrymple are made parties to the action. No suggestion is made, however, tending to show wherein the defendants are prejudiced by the absence of Oliver C. Dalrymple as a party; nor are we able to discover from anything averred in the complaint that his absence or presence as a party can prejudice or affect the interests of the defendants. True, the plaintiffs allege or attempt to set up a homestead right in the premises in question, and seem to base their claim of homestead upon the statement that plaintiffs and their father, Oliver C. Dalrymple, have occupied the premises as a homestead ever since the decease of their mother in 1891. But this claim, we think, is overthrown entirely by the other facts pleaded in the complaint, whereby it appears that the title once vested in Isabella C. Dalrymple, the mother, has been vested since her death in the Cass County Bank, and that such title is now vested in the plaintiffs. Plaintiffs' having the title in themselves is a fact which is inconsistent with any homestead right in their father; and the plaintiffs, being minors, no mention being made that they are heads of families, cannot acquire a homestead right, at least during their father's lifetime. So far as appears in this record, therefore, Oliver C. Dalrymple has as an individual no interest in the result of this action, and there is no claim made that he has ever at any time since the deed to John C. Dalrymple was delivered asserted or claimed any interest in or right to the premises in question. But defendants' counsel argue that said John C. Dalrymple should be made a party defendant, and claim that, inasmuch as John C. Dalrymple is vested with title by a deed absolute on its face that the title to the premises cannot be quieted in the plaintiff in any action in which John C. is not a party. We think this proposition is untenable for two reasons, and the first is that the complaint, when considered as a whole, shows that John C. Dalrymple has no title or estate in the premises in question, either legal or equitable, and that his sole duty with respect to the title is upon demand therefor to convey his record title to these plaintiffs. Nothing appears tending to show that John C. claims any title as against the plaintiff, or that any person, whether a party to this action or not, has ever claimed title, right, or lien through or by any act done or omitted by John C. Dalrymple. The second reason is that these defendants claim nothing whatever in this action which can affect the rights of said John C. Dalrymple. Defendants, under the facts pleaded, can have no claim whatever to the premises in question which can operate to cloud any title belonging to John C. Dalrymple. He has no title. The defendants, upon the facts shown, have not recovered judgments against John C. Dalrymple, nor sold any property belonging to him, or as to which he can assert any claim of ownership. It doubtless is true that title in plaintiffs as against John

C. Dalrymple cannot be quieted in this action; but there is nothing alleged to show that any controversy concerning the premises exists as against John C., and, if any such controversy ever arises, it is not apparent that the defendants would have, under the facts shown, any interest in such controversy. It follows, of course, that these defendants, upon the facts brought up on this record, have no interests which demand that John C. Dalrymple should be made a co-defendant. It is obviously true, upon the facts stated, that John C. would be a proper party to this action, but, in our view of the case, the interests of the defendants, so far as appear, do not demand his presence as a party. Nevertheless, if it shall develop in any further proceedings in the action that either John C. or Oliver C. Dalrymple is a necessary party, the trial court, under the statute possesses the power to bring them, or either of them, into court as parties. Rev. Codes, § 5238.

But an independent consideration fully justifies the order overruling the two demurrers to the complaint. The complaint states, in effect, that Isabella C. Dalrymple, joining with her husband, executed a mortgage upon the property in question, and delivered the same to the defendant the Security Loan & Trust Company; that such mortgage was subsequently transferred by said company to the Cass County Bank, and thereafter was paid in full, but was not released of record; and with regard to such mortgage the plaintiffs, as should have been stated in another connection, pray that the same may be adjudged to be paid in full, and released of record. These averments of fact constitute a cause of action, and entitle the plaintiffs, as the owners of the property, to the relief for which they ask in this regard. Under an established rule of law, a general demurrer to a complaint for insufficiency will be overruled where several defendants join in a demurrer to a complaint which states a good cause of action as to either of the demurrants. See 6 Enc. Pl. & Prac. 321, and authorities in note 1. Nor, in any aspect of the case, are we able to discover from the facts alleged that the Cass County Bank or the Security Loan & Trust Company have any interests or rights which can be prejudiced or promoted by bringing in other parties as defendants. The averment that said mortgage is paid, and is not released of record, shows that the plaintiffs are entitled to have the same released. Nor could any new parties, if brought in, be heard, upon the facts stated, in opposition to such right.

We observe further that the one fact most conspicuous in this case is that such of the defendants as are judgment creditors of Oliver C. Dalrymple are relying upon the theory that such judgments are liens upon the title to the real estate in question. If they are such liens, it follows that the property in suit must have been owned by Oliver C. Dalrymple either at the time the judgments were docketed or at some later date. The trouble with this assumption is that it is refuted by the facts set out in the complaint. It is true that the facts

pleaded are not entirely clear as to whether the consideration paid to the Cass County Bank, and for which it conveyed the property by warranty deed to John C. Dalrymple, came from the resources of the plaintiffs in whole or in part, nor as to whether Oliver C. Dalrymple paid the whole or some part of the consideration. But we regard this question as unimportant upon the facts set out in the complaint, and we shall, therefore, without deciding who paid the consideration, assume for the purposes of this decision that the complaint shows that the entire consideration was paid out of the individual funds of Oliver C. Dalrymple. This construction of the facts alleged is entirely favorable to the defendants, and one as to which they certainly cannot be heard to complain. Predicating our conclusions upon such assumption of fact, we hold that the complaint shows that the plaintiffs are the owners of the property in suit, and that said judgments are not, and never have been, liens upon the title to such property. We know of no rule of law which can be invoked to prevent a purchaser of real estate from directing the vendor to convey the title of the purchased property to another than the purchaser. This is a matter of frequent occurrence, and in such cases the deed will take effect and pass title according to the nature of the grant. Nor does the mere fact that the party who furnishes the consideration is in debt at the time, or that judgments have been docketed against him, operate in the law to defeat a title so conveyed. True, the conveyance was made to the children of Oliver C. Dalrymple, but this fact, standing alone, does not raise an inference of fraud. *Fluegel v. Henschel*, 7 N. D. 280, 74 N. W. Rep. 996. Nor does the fact that the plaintiffs paid no consideration—which fact, for the purposes of this opinion only, is assumed—furnish evidence sufficient to establish fraud in the transaction. Rev. Codes, § 5055. Under the section last cited the question whether a transfer of real estate is or is not fraudulent is a question of fact, and the question whether the conveyance to John C. Dalrymple was or was not fraudulent is a question of intent, under section 5052, Rev. Codes. True, the law sometimes conclusively presumes a fraudulent intent from a transaction which necessarily and inevitably operates to hinder, delay, or defraud creditors; but no such transaction is pleaded here. There is no allegation of any fraudulent intent, nor that Oliver C. Dalrymple was insolvent when this conveyance was made or at any time, and there is no such presumption arising from the facts pleaded. But we deem it unnecessary to further discuss this feature of the case. Upon this record the transfer of title to these plaintiffs has not been attacked upon the ground of a fraudulent intent in its transfer upon the part either of the plaintiffs or of Oliver C. Dalrymple. Until such an attack is made, we deem it both unnecessary and unwise to further enlarge upon the question of fraud in the transfer.

Only a single point remains for consideration. Counsel for defendants contend that the representative capacity of Oliver C. Dalrymple as guardian of the plaintiffs is insufficiently alleged, and that it is

not stated that said Dalrymple was in fact guardian at the commencement of the action. A careful perusal of the complaint has convinced this court that this criticism upon the complaint is unsound. The averments of the facts in question here might have been made more specific by motion, but that right has been lost by demurring. In any event, these defendants are not in a position to raise the point, for the reason that they have not raised the same by their demurrer to the complaint. Not being so raised by demurrer, the point is waived. The objection goes to the capacity of Oliver C. Dalrymple to sue in the character of guardian in which he has assumed to represent the plaintiffs in this action. This objection can only be raised by special demurrer upon the ground of want of capacity to sue. No such demurrer was interposed. The omission is fatal. Authority on this point is abundant. See Phil. Code Pl. § 296; Bliss, Code Pl. §§ 407-409, inclusive; 6 Enc. Pl. & Prac. 323, and cases in note 5. The order overruling the demurrer to the complaint will be affirmed, and the case remanded for further proceedings in the District Court. All the judges concurring.

(83 N. W. Rep. 245.)

FIRST NATIONAL BANK OF FARGO *vs.* RED RIVER VALLEY NATIONAL BANK.

Opinion filed May 23, 1900.

Directed Verdict—Refusal—Waiver of Error.

A defendant who wishes to avail himself of error in denying a motion for a directed verdict, made at the close of plaintiff's case, must, in case he thereafter introduces testimony, renew the motion at the close of the case; otherwise the error is waived.

Presumption of Consideration for Written Instruments.

Sections 3880, 3881, Rev. Codes, provide that "a written instrument is presumptive evidence of a consideration," and cast the burden of showing a want of consideration upon the party seeking to invalidate or avoid it. It was not error, therefore, to receive a chattel mortgage in evidence, over an objection that it was without consideration; no evidence having been offered or introduced to overcome the statutory presumption of consideration.

Conversion—Measure of Damages—Highest Market Value.

The measure of damages recoverable for the wrongful conversion of personal property is fixed by section 5000, Rev. Codes. Under said section the injured party may recover the highest market value at any time between the conversion and verdict, when the action has been prosecuted with reasonable diligence.

Correct Measure of Recovery.

Held, upon the facts stated in the opinion, that the trial court did not err in permitting plaintiff to recover the highest market value.

Reasonable Diligence—When a Question of Law.

Where the facts as to diligence are not in dispute, the question whether a case has been prosecuted with reasonable diligence is one of law, for the court. It is necessary, therefore, in order to secure a review of the determination of the trial court thereon, upon appeal, to bring up on the record and before this court all of the facts upon which such determination was made.

Appeal from District Court, Cass County; *Lauder, J.*

Action by the First National Bank of Fargo against the Red River Valley National Bank of Fargo. Judgment for plaintiff. Defendant appeals.

Affirmed.

Mills, Resser & Mills, for appellant.

It is contrary to the intention of the statute, § 5000, Rev. Codes, that the plaintiff should, by its own delay in the prosecution of its case, enhance its damages. *Pickett v. Rugg*, 1 N. D. 230, 46 N. W. Rep. 446; *First Nat. Bank v. Elevator Co.*, 8 N. D. 430, 69 N. W. Rep. 874; *Page v. Fowler*, 39 Cal. 412. The chattel mortgage so far as it attempts to secure notes of A. B. Thompson, made prior to the giving of the mortgage, is without consideration. § 3871, Rev. Codes; *Parker v. Morrison*, 46 N. H. 280; *Kansas City Mfg. Co. v. Gandy*, 9 N. W. Rep. 569.

Newman, Spalding & Stambaugh, for respondent.

Appellant having no right to the possession of the crops in question, cannot urge any defense to the mortgage of Cora A. Thompson. The case was ready for trial at the first jury term of court after the conversion, at which it could with reasonable diligence be placed on the calendar. Greater diligence would have been productive of no results. The law requires no such extraordinary diligence. *Wright v. Bank*, 110 N. Y. 249; *Rossum v. Hodges*, 1 S. D. 311; *Fromm v. Mining Co.*, 61 Cal. 629; § 5094, Rev. Codes.

YOUNG, J. Plaintiff prosecutes this action to recover the value of a quantity of grain, consisting of wheat, oats, barley, and flax, which it claims the defendant took into its possession and converted some time between the 11th day of September, 1896, and the 25th day of February, 1897. The plaintiff bases its right to recover upon a certain chattel mortgage thereon executed by Cora A. Thompson, and dated on March 27, 1896. The plaintiff made a written demand on the defendant for the possession of said grain on February 25, 1897, and the same was refused, and on the same day this action was commenced in the District court of Cass county by the service of a summons and complaint. Defendant served its answer on April 17, 1897, and the plaintiff caused the case to be placed on the trial calendar of said court for the jury term commencing April 28, 1897. The judge of the Third Judicial District Court, wherein said action was pending for trial, was disqualified from presiding, and therefore called in the Honorable W. S. Lauder, judge of the

Fourth Judicial District, by written request, as authorized by section 5179, Rev. Codes, to try the case. The case was tried at the February 9, 1899, term of said court, which was the first jury term of court, at which the cause could be tried by Judge Lauder, since its commencement. The plaintiff recovered a verdict of \$1,062.95, and judgment was entered on the verdict. The defendant caused a statement of the case to be settled, embracing specifications of numerous alleged errors of law, which are urged in this court as grounds for reversing the judgment.

It will be necessary, before proceeding to the consideration of the errors assigned in counsel's brief, to state the following preliminary facts: The land upon which the grain in controversy was grown consists of two adjoining quarter sections, situated in Cass county, and about 25 miles from Fargo, where both the plaintiff and defendant banks are located. These lands were school lands, and were sold by the board of university and school lands in 1893, one quarter to R. S. Thompson, and the other to Mary A. Thompson, and the usual sale contracts issued to such purchasers. R. S. Thompson died in 1894, and Mary A. Thompson died in 1895. On March 27, 1896, all of the heirs of the above-named persons joined in a quitclaim deed conveying said premises to Cora A. Thompson. The grain in question was the crop of 1896. It was raised and harvested by tenants under an agreement by which the tenants were to receive one-half of the crop, the seed being furnished by the landlord. The tenants received their share, and that in controversy is the other part. On the 27th day of March, 1897, which was the day she received the quitclaim deed from the heirs, Cora A. Thompson executed and delivered a chattel mortgage to the plaintiff bank upon all her interest in all crops of every name and nature to be grown on said land during said year. This mortgage secured two notes signed by A. B. Thompson, who was the husband of the mortgagor, as follows: One for \$294.15, dated February 8, 1895; the other for \$255, dated March 27, 1895,—the due date of both being October 1, 1895. Besides the foregoing notes of her husband, the mortgage, in terms, secured "all future advances, loans, or discounts" which said bank might thereafter make to the mortgagor, "and all future indebtedness of said mortgagor to said bank, of every name and nature whatever." It appears that the plaintiff made advances under said mortgage to pay delinquent taxes on the land in question, and also to purchase the seed grain from which the grain in dispute was grown. For these advances Cora A. Thompson gave the plaintiff her personal note. The total amount due upon the two notes of her husband, which are described above, and for the advances for seed and taxes which we have just mentioned, at the date of the verdict, was \$1,175.13, which is \$112.18 more than the amount of the verdict recovered. The defendant seized the grain in question on September 11, 1896, upon the supposition that it was

the property of A. B. Thompson, the husband, and under a chattel mortgage executed by him on October 1, 1893, covering the crop of 1896.

We now turn to the errors assigned and urged in the brief of appellant's counsel:

First, error is assigned on the court's ruling denying a motion for a directed verdict made at the close of plaintiff's evidence. This assignment need not be considered. The record shows that after the motion was denied the defendant introduced further evidence, and thereafter failed to renew the motion. This court, in an early case, established the rule that error cannot be predicated upon a refusal to direct a verdict at the close of plaintiff's case, when testimony is thereafter offered by the defendant. The error, if any exists, is waived unless the motion is renewed at the close of the testimony. *Bowman v. Eppinger*, 1 N. D. 21, 44 N. W. Rep. 1000. See, also, *Colby v. McDermont*, 6 N. D. 495, 71 N. W. Rep. 772; *Tetrault v. O'Connor*, 8 N. D. 15, 76 N. W. Rep. 225.

Counsel for the defendant requested the trial court to instruct the jury that the plaintiff could not recover for the amount represented by the two A. B. Thompson notes, which are described in the mortgage, upon the ground that as to said notes the mortgage was without consideration. The same question was presented by an objection to the introduction of the notes and chattel mortgage in evidence, and also by an exception to the court's charge to the jury permitting the jury to include said notes in computing the amount secured by plaintiff's chattel mortgage. The court did not err on this point. It is true that the plaintiff offered no independent evidence to establish the existence of a consideration for the mortgage, so far as it relates to these two notes. Neither, on the other hand, was evidence offered by defendant to show that there was no consideration. In that condition of the record, the statutory presumption that there was a sufficient consideration, which attaches to every written instrument, must prevail. Section 3880, Rev. Codes, provides that "a written instrument is presumption of a consideration;" and the next section (3881) provides that "the burden of showing a want of consideration sufficient to support an instrument lies with the party seeking to invalidate or avoid it." No independent proof of consideration was necessary until it was attacked by the defendant by evidence which would overcome the statutory presumption.

In fixing the measure of damages the trial court determined that the plaintiff was entitled to the highest market price of the grain between the date of the alleged conversion and the verdict, without interest, instead of the value of the property at the date of the conversion, with interest thereafter, and, against the defendant's objection, permitted plaintiff to amend its complaint at the trial to increase the amount of its demand for damages to correspond with the highest price of grain during the period between the conversion and verdict, which was stipulated to have been in June, 1898, at

which time wheat, by reason of the Leiter corner, reached the unnatural price of \$1.42 per bushel, which was at least twice its value at the date of the conversion. The same question was also raised by objection to evidence of the highest market value, and by an exception to that portion of the charge of the court which fixed the highest market value, without interest, as the measure of damages to govern in case they found for the plaintiff. The several assignments of error predicated upon the foregoing all depend for solution upon the single question whether, upon the record before us, we can say that the trial court erred in fixing the measure of damages. If it did, the amendment to the complaint should not have been allowed, or the evidence complained of received. If, however, it does not appear that the court erred in determining the measure of damages, then it was proper to allow the amendment, and to receive the evidence objected to, and give the instruction of which the defendant complains. The legislature of this state has established a definite rule for measuring damages caused by the conversion of personal property. Section 5000, Rev. Codes, so far as pertinent, reads as follows: "The detriment caused by the wrongful conversion of personal property is presumed to be: (1) The value of the property at the time of the conversion with the interest from that time; or (2) when the action has been prosecuted with reasonable diligence, the highest market value of the property at any time between the conversion and the verdict, without interest, at the option of the injured party." This statute has been before us in two previous cases. *Picket v. Rugg*, 1 N. D. 230, 46 N. W. Rep. 446, and *First Nat. Bank of Fargo v. Minneapolis & N. Elevator Co.*, 8 N. D. 430, 79 N. W. Rep. 874. In *Picket v. Rugg* the court took occasion to call attention to the injustice which will necessarily follow in many cases by an application of the rule promulgated by the legislature in the section just quoted, by giving to the injured party not merely compensation for the injury he has suffered, but a right to recover the highest market value up to the time of the verdict, however fictitious that value may be. In the case at bar the recovery for the wheat converted bears no just relation to the damage which the plaintiff suffered. It is a misnomer to call it "compensation." It is largely punishment. But, however averse we may be to the rule, it is the rule which governs; and the plaintiff has an absolute right to recover the highest market price, if it so elects, provided only that it has prosecuted its action with reasonable diligence. Counsel for defendant contends that the court erred in determining that the facts show reasonable diligence in prosecuting the action. In *Picket v. Rugg*, supra, it was held, in accordance with the prevailing opinion of the courts, that, where the facts upon the question of diligence are not in dispute, the question as to whether reasonable diligence has been exercised is ordinarily to be determined by the court, as a question of law; further, that the reasonable diligence required of a suitor relates both to the commencement of the action and the subsequent prosecution. It is ap-

parent, then, that, if an error was made by the trial court in determining the measure of damages, it was an error of law; and in this case the error must consist, if there was error, in erroneously concluding, from undisputed facts, that plaintiff had commenced and prosecuted the case with reasonable diligence, within the meaning of the statute, for there is no pretense or claim that the error complained of arose from a failure to submit disputed facts to the jury for determination. So that it is fair to say that the facts upon which the court acted were undisputed. We are not fully informed as to what those facts were. The statement of the case does not, we think, purport to embrace all the facts which would be pertinent to a determination of the question of reasonable diligence, and for that reason we are in much doubt whether the defendant is in a position to urge the error, if error it was, in this court; for it is evident that our review must of necessity extend to all and the same facts which the trial court had before it in making its determination, and, if they do not all appear in the record brought to this court for the purpose of securing a review, it would seem that the right to review would not exist. The question of whether a case has been prosecuted with reasonable diligence may depend upon a great variety of facts. The dates when it was actually commenced and when it was tried are not the only facts, or always controlling. A knowledge of the facts upon which his case rests, and of his rights, by the party injured, his presence or absence from the state at the time, ease or difficulty in gathering necessary data for commencing the action, and numerous other matters which will readily occur to ever practitioner, are or may be important facts in determining the question whether reasonable diligence has been exercised in commencing and in prosecuting a case. Further, each case must turn upon its own facts. We shall assume, however, in this case, and for the purposes of this decision, that the record before us contains all of the facts upon which the trial court based its determination. The question, then, is, do they warrant the conclusion that plaintiff has prosecuted its case with reasonable diligence? We are of the opinion that they do. First, the action was commenced seasonably. In fact, so far as the record before us shows, it was commenced on the same day the conversion actually occurred. It is true, the grain was taken from the possession of the tenant on September 11, 1896, and the action was not commenced until February 25, 1897, which was more than five months later. But the demand for possession did not occur until the last-named date. There is no evidence before us that plaintiff had any knowledge that the grain had been taken by the defendant prior to the day the demand was made. Nor do we find anything in the record that warrants us in holding that a conversion occurred before the demand was made. It was not taken from the possession of the plaintiff, but of a tenant at the farm, some 25 miles from the plaintiff's place of business. We cannot assume that the defendant came into possession of the grain in controversy originally unlawfully and in defiance of the plaintiff's mort-

gage. Under the facts presented in the record, it would seem that the conversion occurred when the defendant refused plaintiff's demand for possession, which, as we have seen, was the very day the suit was commenced. Appellant's chief reliance, however, is on the delay which occurred in bringing the case to trial. It was not tried until February 9, 1899, which was almost two years after it was commenced; and it was during this period, namely, in June, 1898, that wheat reached its highest price. We are unable to discover anything in the record which shows that the plaintiff was responsible for this delay, or that it came from any cause which it could control. On the contrary, it is shown that the plaintiff placed the case on the trial calendar at the first term after it was commenced. On account of the disqualification of the judge of the district, the judge of a neighboring district was called in to try the case, and the record emphatically states that such judge tried the case at the earliest time that it was possible for him to do so. The plaintiff's right to the highest market price depends upon its diligence alone, and, if the reasonable diligence which the law requires has been exercised in prosecuting a case,—and we are satisfied it has been in this case,—that right is not defeated by the law's delays, over which the plaintiff has no control. Plaintiff's attitude has been consistent at all stages of the case, in demanding the highest market price. In none of the several amended complaints has it demanded interest.

Error is also assigned on the admission of evidence as to certain advances made by plaintiff to pay interest on the school land. It is not necessary to consider this; for, as we have seen, aside from these items the amount secured by the mortgage at the date of the verdict exceeded the amount of the verdict, so that no prejudice could have resulted to the defendant, even though the interest payment should be held to be not secured by the mortgage. Without them the amount due was greater than the verdict. Finding no error in the record, the judgment of the District Court is affirmed. All concur.

(83 N. W. Rep. 221.)

ANDREWS & GAGE vs. THE STATE BANK OF WHEATLAND.

Opinion filed May 24, 1900.

Banks—Deposit—Evidence—Loan.

The issuance of a deposit slip by a bank or the entry of a deposit in a pass book has only the effect of a receipt for money. While it raises a presumption that the deposit was made, yet it is open to parol explanation.

Deposit to Another's Credit—Entry in Pass Book.

But where D. was indebted to A. & G., and applied to the bank for a credit for the amount for a few days, promising to then deposit to balance the credit, and such credit was given, the transaction amounted to a loan by the bank to D. of the amount; and where D.

took a deposit slip in the name of A. & G. for the amount, and also a pass book in their name, in which the deposit of the amount was entered, and delivered the same to A. & G. as payment of his debt, the legal effect was a deposit by A. & G. of the amount for which the credit was given, and the failure of D. to fulfill the promise upon which the credit was extended could not affect the legal rights of A. & G.

Appeal from District Court, Cass County; *Pollock, J.*
Action by A. C. Andrews and J. E. Gage against the State Bank of Wheatland. Judgment for plaintiffs. Defendant appeals.
Affirmed.

John E. Green, for appellant.

Ball, Watson & Maclay, for respondents.

BARTHOLOMEW, C. J. This action was brought to recover the amount of two deposits which plaintiffs allege were made to their credit in the defendant bank. The answer was a denial of the deposits. The case was tried to a jury, and a verdict directed for the plaintiffs for full amount claimed. Motion for new trial denied, and defendant appeals.

A number of errors are assigned upon the rulings of the court in excluding testimony offered by the defendant, but our application of the law to the conceded facts will show that the excluded testimony was entirely immaterial. The remaining assignments relate to the sufficiency of the admitted evidence to warrant the action of the court in directing a verdict for plaintiffs. They may be considered collectively. The following facts are undisputed: The plaintiffs are co-partners, with their business headquarters in Minneapolis. In 1898 and prior thereto they operated grain elevators in this state, one of which was situated at Wheatland, in Cass county. Prior to June 13, 1898, one Diemer had been the agent of plaintiffs in purchasing grain and conducting their business at Wheatland. One Cousins was plaintiffs' general agent in this state, with headquarters at Fargo. The defendant bank was doing business in Wheatland, and an account was kept in said bank in the name of the agent, Diemer, from which payments were made for the grain purchased by said agent at that point. The funds for this account were received by said bank through drafts made by Diemer upon the firm at Minneapolis, and through drafts sent direct by the firm, and through currency deposited by Mr. Diemer. This fund was paid out on the individual checks of Diemer. The firm paid the bank a small commission for paying out the money, but it is entirely clear that the account was the individual account of Diemer. On June 13, 1898, the general agent, Cousins, visited Wheatland for the purpose of closing Diemer's agency, as he (Diemer) wished to quit the service by reason of ill health. From the data then accessible, the general agent and Diemer reached the conclusion that Diemer owed the firm the sum of \$456.39. Mr. Diemer then went to the residence of the cashier of the defendant bank,—the cashier not having gone to the bank that morning,—and informed him that he (Diemer) wanted

a credit at the bank for the sum of \$456.39 for two days, stating that he expected a remittance by that time. The cashier (Mr. Mares) wrote a note to the bookkeeper (Miss Campbell), who acted as cashier in the absence of Mr. Mares, authorizing her to give Diemer credit for the sum of \$456.39. This was done, and Mr. Diemer took the credit in the form of a deposit slip in the name of Andrews & Gage for the amount. The bookkeeper also gave him a pass book for Andrews & Gage, in which was entered on that date a deposit of \$456.39. The deposit slip and the pass book were turned over by Diemer to the general agent. When this settlement was reported to plaintiffs they claimed that the settlement was incorrect, and that there was still \$131.67 due from Mr. Diemer. On June 22d, nine days after the visit just mentioned, Mr. Cousins again went to Wheatland, and saw Mr. Diemer, and reported to him the statement of the firm. Dr. Diemer immediately said that he had already discovered the mistake, and that he would go over to the bank and deposit the amount. He at once went to the bank, and in a few minutes returned with a deposit slip, in plaintiffs' name, for the exact amount due, and turned it over to Mr. Cousins. There is a little uncertainty surrounding the issuance of this deposit slip. It is one of the forms used by the bank. It is dated June 13th, same date as the other slip, yet it could not have been delivered until June 22d. Mr. Mares testifies that he did not make it. The bookkeeper testifies that it is in Mr. Mares' handwriting. But this uncertainty is immaterial. Another agent had been installed in Diemer's place. The pass book that had been given to plaintiffs was in his possession. As soon as the second slip was received this agent took the pass book to the bank, and asked to have the deposit entered thereon. The bookkeeper took the book and passed into the back room, and, returning a moment later, made the entry showing a deposit of \$131.67 on June 22, 1898. She testifies that the cashier informed her that this amount was to be turned over to plaintiffs. This transaction being in turn reported to plaintiffs, they drew their draft a few days later upon the defendant bank for the full amount of the two deposits. Payment of this draft was refused, except as to the sum of \$111.98. The ground of this refusal was the fact that no deposit was made by Diemer as promised to balance the credit of \$456.39 given on June 13th, and for which the first deposit slip was given and entered in the pass book, and at the time the second deposit slip was given and the entry made Diemer had in said bank the sum of \$111.98, and no more.

Counsel for appellant urges that this refusal was justified, and that under these facts there is no liability on the part of the bank except for the sum of \$111.98, which was tendered and refused. Counsel insists that the principles of estoppel cannot be applied to this case; that the facts do not create an estoppel. But we do not think any question of estoppel enters into this case. It is not a case where the truth need be suppressed. If the deposits were not, in legal contemplation, made, then plaintiffs cannot recover; if they

were so made, then they should recover. And, moreover, we agree with counsel that the issuance of a deposit slip or an entry of a deposit in the pass book has no other or greater force than a receipt for money, and is open to parol explanation. *Talcott v. Bank* (Kan. Sup.) 36 Pac. Rep. 1066. But we are clear that, in legal effect, the deposits were made by plaintiffs just as the entries show. We discuss the first deposit. Diemer told the cashier that he desired credit for the amount for a few days, and he would then deposit to balance. The cashier extended the credit. Without taking a note or any written evidence of indebtedness, he instructed his bookkeeper to extend the credit, and it was done. The transaction was, in effect, a loan by the bank to Diemer of that much money. He could deal with it as he saw proper. He might have checked it out at once, and given the currency to Mr. Cousins. If, then, the latter had taken the currency back to the bank, and deposited it in the name of plaintiffs, and taken the deposit slip and the pass book, the rights of the parties would have been exactly the same. Yet in the latter case there could be no claim that the money was not deposited. Instead of pursuing that course, Diemer pursued the course that is adopted in the great mass of commercial transactions consummated through banks, and transferred the credit. Had there been no credit in fact given, and had Diemer received a deposit slip in his own name, and subsequently given plaintiffs a check for the amount with the deposit slip attached, then the case would come within *Bank v. Clark*, 134 N. Y. 368, 32 N. E. Rep. 38, cited by counsel, where the court declined to hold as matter of law that anything was transferred. But the difference in the facts is so radical that the case can have no controlling influence here. To say that nothing was deposited is to say that no credit was given. But the cashier testifies that the credit was given. The difficulty lies in the fact that the promise upon which the credit was given was not fulfilled. The logic of defendant's position is to force the plaintiffs to bear the loss of its bad debts. Of course, the fact that plaintiffs might recover the shortage in a direct action against Diemer, or might recover on Diemer's bond to plaintiffs, cannot change the legal rights of the parties to this action.

The same general principles must govern as to the second deposit. Diemer went to the bank, and returned with a deposit slip in plaintiffs' favor for the exact amount due. That amount was subsequently entered on plaintiffs' pass book. This raised a strong presumption that the deposit had been received. It was necessary for defendant to show that there had been a mistake somewhere. Nothing of the kind is pretended. True, they say Diemer had but \$111.98 to his credit at the time. But it is not claimed that he gave a check even for that, or that the bank intended to limit his credit to the amount on deposit. The bookkeeper testifies that the cashier said that the sum of \$131.67 was to be transferred to Andrews & Gage. By what arrangement Diemer secured this additional credit

is not disclosed, but that it was by some arrangement with the bank is too clear for question. We find no error, and the judgment of the District Court is affirmed. All concur.

WALLIN, J. I concur in the result announced in the majority opinion, but prefer to base my concurrence, under the facts recited, upon the ground that the defendant is estopped from denying liability to plaintiff.

(83 N. W. Rep. 235.)

W. J. MOONEY, *et al.* vs. OWEN WILLIAMS.

Opinion filed May 24, 1900.

Negotiable Instruments—Fraud—Burden of Proof Shifts.

In an action by an indorsee of a negotiable promissory note to recover thereon against the maker, when evidence is introduced which shows that such note was obtained by fraud, and was without consideration, the burden shifts to the plaintiff to establish by competent evidence that he is a good-faith purchaser in due course, and without notice. *Vikery v. Burton*, 6 N. D. 245, 69 N. W. Rep. 193, followed.

Stipulation of Facts—Effect to Cut Off Defense.

Where, in such action, the defendant has signed and filed a stipulation of facts as evidence upon which the case is to be determined, which recites that the note in suit was indorsed by the payee to the plaintiff before maturity, for a valuable consideration, in the ordinary course of business, and without notice, the legal effect of such stipulation is to sustain the burden of proof cast on the plaintiff, and also to cut off the defense of fraud and want of consideration.

Appeal from District Court, Grand Forks County; *Fisk, J.*

Action by W. J. Mooney and L. S. Champaigne against Owen Williams. Judgment for plaintiffs. Defendant appeals.

Affirmed.

D. A. Lindsey, for appellant.

John E. Greene and *Joseph Cleary*, for respondents.

YOUNG, J. This case was commenced in the District Court of Grand Forks county to recover the sum of \$30 and interest as due and unpaid upon a certain promissory note executed and delivered by the defendant to the Realty, Revenue Guaranty Company, a Minnesota corporation, which note the complaint alleges was indorsed to the plaintiffs for a valuable consideration, before maturity, in good faith, and in the ordinary course of business, and is wholly unpaid. The case was submitted to the court without a jury, and without other evidence than that furnished by a written stipulation of facts signed by counsel, to which reference will hereafter be made. The trial court made the written stipulation of facts its findings of fact, and as a conclusion of law therefrom found that plaintiffs were entitled to judgment as prayed for in their complaint, and judgment was accordingly entered in their favor. An appeal has been perfected to this court from the judgment.

The only error assigned in appellant's brief is that "the court erred in finding as a conclusion of law that the plaintiffs were entitled to judgment for the amount of the note sued for in this action. This assignment is clearly without merit. The note in suit is negotiable in form. It is true the stipulated facts show a complete defense to the note as between the original parties, for it is conceded therein that the only consideration which the maker of the note received was a certain "option sale contract" executed and delivered to him by the Realty, Revenue Guaranty Company, the payee, a copy of such contract being attached to and made a part of the findings. This contract is the same as that before us in *State v. Hogan*, 8 N. D. 301, 78 N. W. Rep. 1051, and was issued by the same corporation. In that case we held that it was a contract of insurance. It is stipulated that the Realty, Revenue Guaranty Company had not complied with the laws of the state prescribing the conditions upon which foreign insurance companies may do business in this state when this contract was issued or at all. Under these circumstances the contract, which furnishes the sole consideration for the note in suit, was void at its very inception, so far as the corporation is concerned, under the express provisions of section 3265, Rev. Codes. It is patent, then, that as against the original payee the maker of the note would have a complete defense, both for want of consideration and fraud. But the effect of the stipulation as to fraud and want of consideration for the note goes further than to establish a defense between the original parties to the note. It casts upon the plaintiffs the burden of showing that they are good-faith purchasers of the note in due course, and without notice. See *Vickery v. Burton*, 6 N. D. 245, 69 N. W. Rep. 193, and cases cited on page 249, 6 N. D., and page 193, 69 N. W. Rep. It is clear that the prima facie case made by the plaintiffs by the introduction in evidence of the negotiable note, properly indorsed, was overcome by the facts just referred to, and, if the case stood upon these facts alone, the plaintiffs would necessarily fail. But we find that the burden cast upon the plaintiffs to show that they are good-faith purchasers in due course, and without notice, is fully met by an express stipulation on the part of the defendant "that said promissory note was indorsed by the payee therein, said corporation, to the plaintiffs, before maturity, for a valuable consideration, in the ordinary course of business, and without notice, and that the plaintiffs had no notice or knowledge of the character or objects of said corporation other than appeared from the face of said note," and that no part of the note has been paid. It is clear that the foregoing stipulation not only sustains the burden which was cast upon the plaintiffs to prove a good-faith purchase of the note in suit, but we think it is entirely sufficient to effectually cut off every defense which the defendant might have relied upon. There is nothing on the face of the note which imparts notice that it is tainted with fraud, or that it is without consideration. While it is

true the payee, the Realty, Revenue Guaranty Company, was not authorized to do an insurance business, by reason of noncompliance with the laws of this state, it is stipulated that it had complied with the laws relating to foreign corporations other than insurance companies, and it was, therefore, authorized to receive and transfer the note in question unaffected by any statutory prohibition.

Further discussion is not necessary. From what has already been stated, it will be seen that our decision rests upon facts which have been agreed to for the purposes of this case, and this case alone, and that our determination can have no value as a precedent in any other case unless the same facts exist either by stipulation or are established by competent evidence. The written stipulation of facts presented to the trial court, which were made its findings of fact, differed in form from, but in legal effect amounted to, a confession of judgment by the defendant. They were certainly broad enough to make a case for the plaintiffs, and to effectually cut off the defendant's defense. The trial court did not, therefore, err in ordering judgment for the plaintiff, and the same is accordingly affirmed. All concur.

(83 N. W. Rep. 237.)

JEAN B. LADEROUTE *vs.* JULIA CHALE, *et al.*

Opinion filed May 25, 1900.

Deed—Covenants—Breach—Assumption of Debt.

The defendants conveyed to the plaintiff a tract of land by a deed of warranty embracing, in addition to the usual covenant for peaceable possession and quiet enjoyment, the following, as to incumbrances: "That the same are free from all incumbrances, except a first mortgage for two hundred and fifty dollars." Said mortgage had been placed upon the premises by a former owner, and was given to secure a loan of \$250, to be paid in five years, with interest at the rate of 10 per cent. per annum. A note for the principal sum, with interest at 7 per cent. per annum, payable annually until the maturity of the principal debt, was given by the borrower, and the mortgage referred to in the deed was given to secure such note. The borrower also gave the lender a series of notes falling due concurrently with the interest payments payable upon the 7 per cent. note. Said small notes drew no interest prior to their maturity, and in their total aggregated \$35.50, which amount represented the total interest on said principal sum computed at 3 per cent. per annum for five years. A mortgage in the usual form was given to secure said series of small notes. Said mortgage was not referred to in said deed, and neither the grantors nor the grantee knew of the existence of this mortgage at or prior to the date of the delivery of the deed to the plaintiff. These mortgages were of even date, and both were given to secure the payment of said loan of \$250 and interest, and were part and parcel of one and the same transaction. Under the terms of the sale contract, the plaintiff assumed and agreed to pay said debt of \$250, as a part of the consideration and price of the land, and at that time plaintiff knew that the debt drew interest at the rate of 10 per cent. per annum. Plaintiff, after paying interest on the principal for a period of three years at 10 per cent.,

ceased to pay interest, and subsequently said small mortgage was foreclosed, and said premises were sold for a balance of \$18.50 then due, and secured by said small mortgage. The premises were not redeemed from the sale, and plaintiff was evicted from the premises under a title acquired under said foreclosure. Plaintiff sues to recover, as damages, the amount of the purchase money paid by him to defendants, with interest, and alleges a breach of defendants' covenant for peaceable possession and quiet enjoyment, arising by reason of plaintiff's eviction from the land by title paramount. *Held*, that plaintiff cannot recover. The small mortgage was given to secure the principal debt and interest, which plaintiff had agreed to pay, and which debt thereby became the plaintiff's debt. Under such circumstances, the covenants sued upon did not refer to or cover either of the mortgages given to secure the debt so assumed by the plaintiff.

Appeal from District Court, Cavalier County; *Sauter, J.*
Action by Jean B. Laderoute against Julia Chale and John B. Chale. Judgement for defendants. Plaintiffs appeal.
Affirmed.

J. C. Monnet, for appellant.

W. J. Kneeshare, for respondents.

WALLIN, J. This action is brought to recover damages for an alleged breach of a covenant of warranty of peaceable possession and quiet enjoyment. The action was tried without a jury, and judgment was entered in the District Court dismissing the action, with costs against the plaintiff. The record embraces all the evidence, and the appellant asks a trial anew in this court.

The facts which we regard as controlling the result in this court may be briefly stated as follows: The land involved in this controversy was on April 10, 1889, owned in fee simple by one Jean B. Rivard, who on said date negotiated and obtained a loan of \$250 from the Fargo Loan Agency, and by the terms of which loan the principal sum borrowed was to become due in five years from said date, and interest thereon at the rate of 10 per cent. per annum upon the principal was agreed to be paid annually in installments. By an agreement entered into between said borrower and lender, said loan was secured as follows: By a note for \$250 falling due in five years from said date, and drawing interest at the rate of 7 per cent. per annum, payable annually. Said note was signed by said Rivard and his wife, and was made payable to the Fargo Loan Agency. To secure the payment of this note, said Rivard and his wife executed a mortgage upon said land, and delivered the same to said Fargo Loan Agency, in whose favor it was made. Said mortgage embraced the usual covenants, including a power of sale, which power became operative, by its terms, upon a default in the payment of such interest, as well as upon other conditions set forth in the instrument. To further secure the payment of interest on said principal sum borrowed, and at the agreed rate of 10 per cent. per annum, said Rivard and his wife on said 10th day of April, 1889, made and delivered to said Fargo Loan Agency another

mortgage on said real estate, to secure a series of annually maturing interest notes, and bearing the same date as the principal note, and which last-mentioned series of notes aggregated at their maturity the sum of \$37.50, which amount was the total of the interest to be paid on said principal sum of \$250 for a period of five years, when computed at the rate of 3 per cent. per annum. Said last-mentioned mortgage also contained, among other stipulations, a power of sale, to become operative upon default in paying said last-mentioned notes, or either of them. The mortgage first described was filed for record April 24, 1889, and the mortgage last referred to was filed May 5, 1889; but both of said mortgages and both series of notes were given and received as part and parcel of the same loan transaction, viz: as security for the payment of said loan of \$250, together with interest thereon at the stipulated rate of 10 per cent. per annum, and said securities were given for no other or different purpose. Subsequently, and while both of said mortgages were outstanding and unpaid, the land in question was conveyed to said defendant Julia Chale; and still later, and on the 22d day of September, 1889, said Julia Chale and said defendant John B. Chale, who is her husband, conveyed said premises to the plaintiff by their joint deed, which deed embraced, in addition to the usual covenants for peaceable possession, quiet enjoyment, and warranty, the following covenants as to incumbrances: "That the same are free from all incumbrances, except a first mortgage for two hundred and fifty dollars." It appears and is conceded that the purchase price of said premises was \$800, and that said sum of \$250 was included in the purchase price, and agreed to be paid by the plaintiff. The plaintiff paid upon said purchase price the following amounts, viz: \$50 in the year 1891; \$400 in the year 1892; and \$100 was paid in land in the year 1893. No part of said principal sum of \$250 was ever paid, and none of the notes secured by said mortgage for \$37.50 which fell due after the year 1891 were ever paid, and none of the coupon interest notes annexed to said 7 per cent. note were ever paid after the year 1892. It further appears that by reason of the plaintiff's default and neglect to pay the notes maturing after the year 1891, and secured by said mortgage for the sum of \$37.50, said mortgage was foreclosed, by advertisement, for the sum of \$18.35, which was the balance claimed to be due upon said mortgage at the date of the foreclosure, after deducting the total amount of certain payments thereon theretofore made by the plaintiff. At such foreclosure sale said Fargo Loan Agency was the purchaser, and, said premises never having been redeemed from the foreclosure sale, said Fargo Loan Agency received a sheriff's deed of the premises, and thereby became vested with the title to said premises in fee simple. The foreclosure sale was made and the sheriff's certificate of sale delivered on the 7th day of October, 1893; and thereafter, and after the year of redemption had expired, but before the sheriff's deed was delivered, and on the 1st day of February,

1895, said Fargo Loan Agency entered into a contract of sale of said premises, whereby it agreed to sell said premises to one Samuel Clairmont for the sum of \$600, to be paid in installments, and whereby said Clairmont was to have the immediate possession of said premises. Subsequently, and in the month of March, 1895, and upon the repeated demands of said Clairmont for the possession of said land, the plaintiff yielded possession to said Clairmont, and possession thereof was taken by said Clairmont under his said contract. On the 6th day of July, 1896, a sheriff's deed of said premises was delivered to the Fargo Loan Agency pursuant to said foreclosure sale, and which deed was thereafter duly recorded. Plaintiff alleges that, while he was in possession of said premises under his said deed, he improved the same by clearing and breaking the same, and that such improvements were worth the sum of \$200, and that in the season of 1894 he plowed 75 acres of said land, which was worth \$1.50 per acre. Plaintiff demands judgment for these amounts, in addition to the \$550 paid on the purchase money, and \$94 paid as interest thereon, making a total of \$956.50.

The trial court made the following finding of fact, among others, which we think is supported by a preponderance of the testimony: "That one Jean B. Rivard borrowed from the Fargo Loan Agency the sum of \$250, and, for the purpose of securing said sum, executed two mortgages to the Fargo Loan Agency, one for the sum of \$250 and one for \$37.50 (the former bearing seven per cent. interest, and the latter being for three per cent. interest for the five-year term, spread over that period, and payable in installments yearly), and that although the same were made in two mortgages, as is customary by some loan companies, the loan was simply for the amount of \$250 at ten per cent. interest, the second mortgage represented merely three per cent. of the ten per cent. interest, and plaintiff had full knowledge of the fact; that the said mortgage or total amount due under said mortgage was \$250, with interest at ten per cent., and that plaintiff for several years after the purchase of said property continued to pay the interest coupons on the \$250 mortgage at seven per cent., and the yearly installments on the second mortgage for \$37.50, being the ten per cent. interest on the \$250 loan, and it was the intention of the parties, in executing said deed and instrument, to except the said mortgage for \$250, with interest at the rate of ten per cent., and including the \$37.50 second mortgage,—the same being really a part of the first mortgage, and a part of the ten per cent. interest due thereon." It does not appear that the plaintiff was specifically informed or knew at or prior to the time he received his said deed of warranty that a second mortgage for \$37.50 was a lien upon the premises. In fact, the contrary appears. But it is likewise established that the plaintiff knew and fully understood when he received his deed that there was a mortgage of \$250 against the land, and that said amount drew interest at the rate of 10 per cent. per annum. The payment of this mortgage,

including the interest, was assumed and agreed to be paid by the plaintiff as a part of the purchase price of the land, and for several years after the delivery of the deed the plaintiff paid interest on the \$250 mortgage at the stipulated rate of 10 per cent. It is true that the evidence shows that the plaintiff is an ignorant Frenchman, who cannot read or write the English language, and that during the period in question said defendant John B. Chale was the friend and business adviser of the plaintiff, and did most of plaintiff's business. It is further true that the plaintiff did not personally remit the interest payments made by him, but that he brought the interest money to John B. Chale, and the latter remitted the same for him to the Fargo Loan Agency. But in this respect it does not appear that the plaintiff was deceived or was attempted to be misled in any way. Much less does it appear that he did not know when the payments were made that he was paying interest on the \$250 mortgage at the rate of 10 per cent. per annum. The record shows that the plaintiff not only knew that the \$250 which he agreed to pay drew interest at 10 per cent. per annum, but there is no evidence whatever which indicates that he was ever misled as to the rate of interest agreed to be paid upon said amount of \$250. The testimony is undisputed that interest at the rate of 10 per cent. per annum was paid by the plaintiff on the \$250 mortgage for three years, and that he knew that it was so paid, and furnished the funds to pay it. Nor is it claimed that plaintiff did not know and have actual knowledge that the premises were being advertised for sale, and would be sold at foreclosure sale for a sum insignificant in amount. He testified not only that he knew the sale would be made, but to the further fact that he did not redeem from the sale because he was unable to do so. It seems, too, that plaintiff had the advice of an attorney, and that, acting upon such advice, he deliberately elected to allow the title to pass from himself to the purchaser at the foreclosure sale, and by so doing expected to lay the foundation to recover back at least the entire purchase money paid by him, with interest thereon, in an action to be instituted upon the covenants in his deed of conveyance.

Upon the state of facts thus narrated, the question presented for decision is whether the plaintiff is entitled to recover upon the covenants of warranty embraced in his deed. We have no hesitation in giving to this question a negative answer. In reaching this conclusion, we have not ignored the fact that the mortgage for \$37.50, which was foreclosed, was not mentioned as an incumbrance in the plaintiff's deed of warranty, nor the further fact that plaintiff did not know of its existence at or any time prior to his purchase of the land. It is undisputed that neither the plaintiff nor the defendants, the grantors in the deed, had any knowledge of the existence of the small mortgage at any time prior to the sale of the land to the plaintiff. The fact which, in our view, is pivotal in the case, is a conceded fact. It is this: The plaintiff, as a part of his contract of

purchase, agreed to pay the \$250 debt, which debt was secured by both mortgages. Such debt, with the interest to accrue thereon at the rate of 10 per cent. per annum, was a part of the purchase price, which plaintiff bound himself to pay; and plaintiff well knew and fully understood that this debt and the accruing interest thereon were an incumbrance upon the land, which he bound himself to discharge. Under such an agreement, as between the covenantors and covenantee, the covenants in the deed as to such debt and interest ceased to have any force or effect as binding covenants. Under the contract of purchase the debt of \$250 and interest became the debt of the plaintiff, and for which the plaintiff's land was pledged in payment. It appears in this case, therefore, that a mortgage which secured the payment of plaintiff's own debt was foreclosed for the reason that plaintiff did not meet and discharge his own debt at the time it fell due. An action would lie against plaintiff, in favor of the mortgagee, to recover the debt of \$250 and interest, despite the fact that plaintiff's agreement to pay the same rested wholly in parol. See *Moore v. Booker*, 4 N. D. 543. 62 N. W. Rep. 608, and opinion page 549, 4 N. D., and page 609. 62 N. W. Rep. The doctrine which controls the case is well established. In *Jones upon Real Property*, the learned author of that work lays down the rule in the following language (section 980): "Where, upon the execution and delivery of a deed, the purchaser retains the entire consideration, or some part of it, and holds it upon the trust and agreement that he would apply it to the payment of existing incumbrances on the land, which the grantor was bound to pay, in an action for breach of the covenant against incumbrances in a deed evidence of such agreement is admissible in defense of the action. It does not show or tend to show that the incumbrance was not to be paid off by the grantor, but that it was to be paid out of his own money in the plaintiff's hands for that purpose. It does not contradict, vary, or change the effect of the deed or covenant." The rule as thus stated had been recognized and applied in the following cases: *Watts v. Welman*, 2 N. H. 458; *Allen v. Lee*, 1 Ind. 58; *Medler v. Hiatt*, 8 Ind. 171; *Pitman v. Conner*, 27 Ind. 337; *Fitzer v. Fitzer*, 29 Ind. 468; *Blood v. Wilkins*, 43 Ia. 565; *Wachendorf v. Lancaster*, 66 Ia. 458, 23 N. W. Rep. 922; *Becker v. Knudson*, 86 Wis. 14, 56 N. W. Rep. 192; *Burbank v. Gould*, 15 Me. 118; *Laudman v. Ingram*, 49 Mo. 212; *Drury v. Improvement Co.*, 13 Allen, 168; *Preble v. Baldwin*, 6 Cush. 549; *Brackett v. Evans*, 1 Cush. 79; *Sidders v. Riley*, 22 Ill. 110; *Corbett v. Wrenn*, 25 Ore. 305, 35 Pac. Rep. 658. Upon the authorities cited, as applied to the facts embraced in this record, our conclusion is that the plaintiff's action was properly dismissed; and hence the judgment entered in the District Court should be affirmed, and this court will so direct. All the judges concurring.

(83 N. W. Rep. 218.)

OSCAR BOYD *vs.* JOHN W. VON NEIDA.

Opinion filed May 25, 1900.

Decedent's Estate—Rejection of Claim.

Under section 6405, Rev. Codes 1899, a claim against an estate may be rejected by an administrator either by indorsing his written disallowance on such claim, or by neglecting or refusing to act thereon for a period of 10 days after it is presented, and in either case the rejection is, under said section, a rejection by the administrator.

Pleading Limitation.

Section 6407, Rev. Codes, provides that suit must be brought upon a rejected claim within 3 months after its rejection; otherwise, it is forever barred. Accordingly *held*, that an answer in an action upon a rejected claim which alleged that the claim was duly presented on July 1, 1897, and that the same was not acted upon within 10 days thereafter or at all, and that more than 3 months after such 10-day period had expired before suit was commenced, states a complete defense, and a general demurrer thereto was properly overruled.

Appeal from District Court, Cass County; *Lauder, J.*

Action by Oscar Boyd against John W. Von Neida, administrator of Edwin Hayward. Judgment for defendant, and plaintiff appeals. Affirmed.

John E. Greene, for appellant.

Ball, Watson & Maclay, for respondent.

YOUNG, J. This is an action against the estate of Edwin Hayward to recover upon a claim which was rejected by the administrator. The answer interposed by the administrator sets forth facts which, if true, would defeat a recovery by plaintiff upon the merits. He also alleges in the sixth paragraph of his answer, and as an absolute bar to a recovery by plaintiff, "that this action was not brought until the expiration of more than three months after the date of the rejection of said claim, and that said claim is barred by the statute of limitations." The facts alleged show that the claim was presented to the administrator on or about July 1, 1897. The administrator took no affirmative action, by either rejecting or allowing it, by written indorsement thereon, within 10 days after its presentation or at all. This action was begun on March 31, 1898. The plaintiff demurred to the defense set forth in the sixth paragraph of the answer, and just referred to, "upon the grounds that the allegations of said paragraph do not contain facts sufficient to constitute a defense to the cause of action set forth in the complaint, or any portion thereof." The demurrer was overruled by the District Court, and, the plaintiff having elected to stand on his demurrer, judgment was ordered and entered for the defendant. Plaintiff appeals from the judgment, and in his brief assigns the order over-

ruling the demurrer as error. The correctness of that order is the only question before us. The solution of this question depends upon the interpretation to be given to certain provisions of the Probate Code relating to the rejection of claims against estates and the period for bringing suit thereon. Sections 6405, 6407, Rev. Codes 1899, being a part of article 5, chapter 111, Laws 1897, read in part as follows:

"Sec. 6405. When a claim accompanied by the affidavit required in this chapter is presented to the executor or administrator, he must indorse thereon his allowance or rejection, with the day and date thereof. If he allow the claim it must be presented to the county judge for his approval, who must, in the same manner, indorse upon it his allowance or rejection. If the executor or administrator, or the judge, refuse or neglect to indorse such allowance or rejection for ten days after the claim has been presented to him, such refusal or neglect is equivalent to a rejection on the tenth day."

"Sec. 6407. When the claim is rejected, either by the executor or administrator or the county judge, the holder must bring suit in the proper court, to-wit: before a justice of the peace, or in the District Court, according to its amount, against the executor or administrator, within three months after the date of its rejection, if it be then due, or within two months after it becomes due, otherwise the claim is barred forever."

In the case at bar the claim was due, and it would therefore be barred at the expiration of three months after the date of its rejection.

Counsel for appellant contends that the claim has not been rejected, within the meaning of section 6407, *supra*, and that, therefore, the limitation period has not commenced to run; and in support of this contention the fact is urged that the claim in suit was not affirmatively rejected by the administrator by a written indorsement to that effect, and that the section last referred to, which fixes the limitation period, has reference only to such a rejection, and not to a rejection resulting from nonaction. We do not think the language of the sections quoted carries any such meaning. Both sections deal with rejected claims. Section 6405 clearly defines two distinct ways by which claims against estates reach the status of rejected claims. One is by actually indorsing a rejection on the claim, with the day and date of such rejection; the other is by the nonaction on the part of the administrator, executor, or probate judge, as the case may be, for a period of 10 days after such claim is presented. Such nonaction may consist of either a neglect to act or a refusal to act upon the claim, but in either case it is just as much of a rejection of the claim as an affirmative rejection by written indorsement, under the plain language of the statute, and is, too, a rejection by such administrator, executor, or probate judge to the same extent and effect as though the rejection had been effected by affirmative action. The statute declares that the refusal or neglect to indorse an allowance or rejection for 10 days after the claim has been presented is equivalent to a

rejection on the tenth day. In other words, if a claim is presented to an administrator, and he indorses upon it his disallowance, with day and date of his action, it is then rejected by him. If, however, he neglects or refuses to either allow or disallow the claim by written indorsement for a period of 10 days after its presentation, the law says that such neglect and refusal constitutes a rejection by him on the tenth day after the claim is presented. The rejections are different in form, but not in effect. In the present case the claim was presented on July 1, 1897. The administrator rejected it by his neglect or refusal to act upon it, and it became a rejected claim on July 11, 1897, so as to set the limitation period running. This action was not commenced for more than three months thereafter. The bar of the statute was therefore complete, and the demurrer was properly overruled. We may add that the statutes we have been considering were adopted in this jurisdiction from California. Their courts had given them the same construction as that we have concluded they should have, and this before they were adopted by us (see *Rice v. Inskeep*, 34 Cal. 224); and, under a familiar rule of statutory construction, we took the statute with the construction placed upon it by the California courts. The judgment of the District Court is affirmed. All concur.

(83 N. W. Rep. 329.)

NORTHWESTERN TELEPHONE EXCHANGE COMPANY vs. NORTHERN
PACIFIC RAILWAY COMPANY.

Opinion filed May 28, 1900.

Interpleader.

Section 5238, Rev. Codes, 1899, construed, and *held* that said section requires the District Court to determine any controversy between the original parties to an action, without interpleading other parties, whenever such controversy can be determined without prejudicing the rights of such other parties or of the parties to the record.

Interpleader Properly Refused.

Upon the facts set out in the opinion, *held*, that the District Court did not err in refusing to consider a certain collateral controversy existing between the appellants and the Northern Pacific Railway Company.

Appeal from District Court, Ransom County; *Lauder, J.*

Action by the Northwestern Telephone Exchange Company against the Northern Pacific Railroad Company and others. Judgment for plaintiff. Charles A. Marston and certain other defendants appeal.

Affirmed.

Morrill & Engerud, for appellants.

Ball, Watson & Maclay, for Northern Pacific Railroad Company.

WALLIN, J. This action was instituted to obtain a condemnation

of a strip of land six feet wide as a right of way for a telephone line over the lands of a large number of parties who are named as defendants. A judgment was entered in the District Court for the relief sought by the plaintiff, and all parties to the action have acquiesced in such judgment except certain of said defendants (Charles A. Marston and others), who have appealed to this court from such judgment.

The complaint states, in effect, that certain lands, described in the complaint as being situated on the south side of the right of way of the Fargo & Southwestern Railway Company, as now located and in operation in the counties of Cass and Ransom, in this state, are owned by said defendants, and that the plaintiff requires a strip or parcel of said lands six feet wide for its said right of way purposes, which strip the complaint alleges has been surveyed, and that the same is located immediately south of, and parallel with, the south line of the right of way of said railway company. A map of the strip required, showing its metes and bounds, and its location with reference to said railroad, is annexed to the complaint.

The Northern Pacific Railway Company was not originally named as a party to the action, but was brought into the case as an additional party by an order of the District Court made under the following circumstances: The defendants who have appealed to this court joined in an amended answer to the complaint, which, in substance, alleged that the said Fargo & Southwestern Railway Company in December, 1882, entered upon said lands of the defendants, and constructed a railroad across the same, and that said railway company has never in any manner acquired any right of way for said railroad across said lands; that said company has transferred and sold its said line of railroad to the Northern Pacific Railroad Company, and that the last-named company in the year 1896, without having acquired a right of way, sold and transferred all of its rights in said railroad to the Northern Pacific Railway Company, and that said last-named company has never in any manner acquired a right of way for said railroad across defendants' said premises, and that said last-named railway company now operates said railroad over and across said premises. The answer further states that it is necessary for the operation of said Fargo & Southwestern Branch of said Northern Pacific Railway Company to "have a right of way across these defendants' premises of not more than 100 feet in width, being a strip of land 100 feet wide parallel with, and fifty feet in width on each side of the center of said railroad track as now laid out." The answer further states, in effect, that said strip of land six feet wide, sought to be condemned for plaintiff's uses, should be located across defendants' premises next to and adjoining the railroad right of way, in order to avoid great and necessary damage to said premises. Defendants allege that the Northern Pacific Railway Company should be made a party defendant to this action, in order that its said right of way over defendants' premises may be

adjusted, and the rights of all parties to the action determined. Defendants pray for affirmative relief, as follows: "These defendants therefore pray that the said Northern Pacific Railway Company be made a party to this action; that such parts of the real estate owned by these defendants described in the complaint as may be necessary for a right of way for said railroad across said land be set apart for said purpose; that the value of the lands so to be allowed to said Northern Pacific Railway Company as a right of way be ascertained and determined, and ordered paid to these defendants as their respective interests may appear; that the necessary right of way for said plaintiff's telephone line be set apart to plaintiff next to and adjoining the railroad right of way; and that defendants have such other and further relief as to the court may seem just in the premises."

After the service of the amended answer, counsel for the plaintiff and of the said defendants who are appellants entered into a stipulation, whereby it was agreed, in effect, that said Northern Pacific Railway Company should be impleaded as an additional defendant in the action; and the District Court, acting upon said stipulation, and upon the pleadings, by its order directed that said company should be impleaded; whereupon copies of said order and the pleadings and of the summons were served upon said company. It further appears that said railway company by its counsel demurred to the plaintiff's complaint upon the ground that it did not state facts sufficient to constitute a cause of action as against said railway company. We do not find by the abstract that the issue tendered by the demurrer was ever adjudicated in the trial court, and we infer that it was not, inasmuch as no claim is made that the complaint states a cause of action as against the said railway company, or as against either of the railway companies, mentioned in the complaint. The record discloses that after said demurrer was served, and in the month of February, 1897, an application was made to the District Court in behalf of said railway company to set aside and vacate the order of said court whereby said railway company was impleaded and made a party defendant. This application was denied by an order of the District Court dated on the 28th day of April, 1897, to which order an exception was saved. Subsequently said railway company, by its said attorneys, applied to the District Court for an order to strike from the amended answer all matters therein save and except the first six lines thereof. The object of this application was to eliminate from the answer such parts thereof as have reference to the right of way of said railway company, and which parts have been above set out in substance and effect. After hearing counsel on both sides, the last mentioned application was denied by an order of the District Court made in February, 1898. The said railway company never at any time responded by an answer either to the complaint or to said amended answer. The record further discloses that, after serving notice of

motion upon counsel for said railway company, an application was made to the District Court in behalf of said defendants who are appellants for the entry of judgment in said action "in accordance with the prayer for relief in the amended answer of said defendants." Said motion for judgment was denied by an order of the District Court dated November 13, 1899, which order is as follows: "The above-entitled action came on to be heard upon the application of the defendants Frances C. Pepper, Grace M. Coburn, Charles A. Marston, Helen S. Coburn, and Louisa H. Coburn for judgment against the impleaded defendant, the Northern Pacific Railway Company, for damages for the appropriation of the right of way for railroad purposes over and across the lands of said defendants so applying for judgment; the said defendants appearing upon said application for judgment by their attorneys, Messrs. Morrill & Engerud, and the impleaded defendant, the Northern Pacific Railway Company, appearing by its attorneys, Messrs. Ball, Watson & Maclay; and now, the court, being fully advised in the premises, does order that the said application for judgment by the said defendants against the said impleaded defendant, the Northern Pacific Railway Company, be, and the same is hereby, denied. It is further ordered that said impleaded defendant, the said Northern Pacific Railway Company, be, and it is hereby, dismissed from this action; to which order, and the whole thereof, said defendants duly excepted, which exception was allowed and made a part of the record."

After said railway company was dismissed as a party by the last-mentioned order, further proceedings were had in the action as against these appellants, but said railway company did not receive notice of such further proceedings in the District Court nor participate therein. A jury was waived, and the trial court, after considering the stipulated facts, made and filed its findings of fact, as follows: "That all the allegations of the complaint are true; that the railroad known as the Fargo & Southwestern Branch of the Northern Pacific Railway Company runs over and across the lands of the above-named defendants, as shown in the complaint; that no right of way for said railroad has ever been obtained from these defendants across said lands, but that the said railroad was constructed across said lands without the consent of the owners, about the year 1882, and has since been continuously operated across said lands; that the Northern Pacific Railway Company, which operates said railroad either under lease or as owner, claims to have a right of way four hundred feet, being two hundred feet on each side of the center of the railroad track as now constructed, across these defendants' lands; that the said railroad does not need a right of way over these defendants' lands more than one hundred feet in width, being fifty (50) feet on each side of the center of the track; that the plaintiff needs for its telephone line a strip of land over the lands of these respective defendants six (6) feet in width; that, in order to cause the defendants the least possible injury, the telephone

company's right of way should be located parallel with, and next adjoining the right of way of the railroad aforesaid, on the south side thereof; that the damage caused to said respective defendants by taking of said land for the plaintiff's right of way for its telephone line are as follows: Frances C. Pepper, Grace M. Coburn, Louisa H. Coburn, and Helen S. Coburn, owners in common of section three (3), township one hundred thirty-six (136) north, range fifty-three (53) west, the sum of thirty-six dollars; Charles A. Marston, owner of the northwest quarter (N. W. $\frac{1}{4}$) section seven (7), township one hundred thirty-six (136) north, range fifty-three (53), is eighteen dollars." From such findings the court, on February 12, 1900, found as legal conclusions that the plaintiff was entitled to have judgment entered condemning for its right of way purposes a strip of land six feet in width over and across the lands of the appellants, "the said right of way to be a strip of land six (6) feet in width, running parallel with, and fifty (50) feet south of, the center of the railroad track of the Fargo & Southwestern Railroad as now located and constructed across said lands." The court then fixed the compensation which each of the appellants was to receive as damages for the appropriation of his land by the plaintiff. The court further found that the action should be dismissed as to the Northern Pacific Railway Company, and directed that judgment be entered upon its said findings. Judgment was entered accordingly, and from which said defendants alone have appealed to this court.

It will not be necessary, in the view which this court has taken of this entire case, to consider the evidence adduced, further than to state that certain depositions were taken and presented to the trial court bearing upon the matter of the damages suffered by the appellants on account of a contemplated appropriation of certain portions of their said lands by said railway company for its right of way. This evidence was not considered by the court below, for the reason that said court, after mature deliberation, made an order dismissing the railway company as a party to the action. After such order, it, of course, became legally impossible to enter a judgment which would in any manner affect or bind said railway company.

The defendants who are appellants have appended to the statement of the case the following specifications of error: "First. The court erred in sustaining the objection of the Northern Pacific Railway Company to said defendants' application for judgment by default. Second. The court erred in making the order denying these defendants' application for judgment, and dismissing the Northern Pacific Railway Company from said action. The appellants desire the Supreme Court to review the question presented by the foregoing specifications. The appellants also desire the Supreme Court to determine that the impleaded defendant is entitled to a right of way 100 feet in width—50 feet on each side of the center of the track—over appellants' lands, and to determine what damages the

appellants are entitled to recover from said impleaded defendant for the taking and holding of said railroad right of way over said lands."

An examination of the questions which appellants have requested this court to review and pass upon suggests certain preliminary considerations which we deem to be pertinent to the case. First, it is noticeable that the plaintiff has not appealed from the judgment entered below. This implies that the plaintiff is satisfied, not only with the width and location of its right of way across the defendants' lands, but likewise with the amount of damages which the District Court required it to pay these defendants for the appropriation of their lands for its purposes. It is also significant that the defendants who have appealed do not desire this court to modify the judgment entered below, either as to the amount of damages awarded to them or as to the width or location of plaintiff's right of way with reference to the railroad or the right of way of the railway company. Nor should the defendants be heard to complain in this court or elsewhere as to the location of plaintiff's right of way over or across their premises, in view of the fact that the same has been located exactly where defendants allege by their amended answer that it should be located. In this respect the wishes of the defendants as expressed in their amended answer have been literally and fully complied with by the District Court by its judgment. The plaintiff's right of way as described in the judgment is as follows: "A strip of land six (6) feet wide, running parallel with, and fifty (50) feet south of, the center of the railroad tracks of the Fargo & Southwestern Railroad as now located and constructed across said land of said defendants."

It is equally clear by the record that the Northern Pacific Railway Company is not aggrieved by the location of the plaintiff's right of way with reference to its railroad or any right of way. That company has not appealed from the judgment, and has at all times, and until it was successful, persisted in its efforts to be dismissed as a party to the action, and did so after being fully advised by the amended answer that the defendants were seeking to have plaintiff's right of way established where it was finally recognized as existing by the judgment of the court. It is true that the judgment does not bind the railway company, because it ceased to be a party to the action prior to the entry of judgment, and yet we deem it significant that the company, when it was called in and could have opposed the location of plaintiff's right of way, elected not to do so; then well knowing that its failure to litigate the question would be followed by the judgment which was entered, and which was foreshadowed by the allegations of the amended answer. If the said railway was legally entitled to the benefit of any award of damages which the court could make in this action, it is remarkable that it failed to assert any such right when an opportunity to do so was presented. Briefly stated, the grievances of the appellants are these: First, that the District Court refused to locate and establish the boundaries of the right of way of the Northern Pacific Railway

Company over and across the lands of the defendants, said right of way not having been previously acquired by said railway company in any manner whatever. Appellants' second grievance consists in the fact of the refusal of the trial court to assess and award damages against said railway company on account of its taking the lands of the defendants for right of way purposes to the extent of a strip of land 100 feet in width.

The evidence in the record bearing upon the question of such damages consists of the testimony of certain witnesses who estimate the damage which would result if the railway company should at any time appropriate for its right of way a strip of defendants' lands 100 feet wide and 50 feet on each side of its railroad track upon said lands. There is no testimony that any such strip or parcel of land has ever in fact been appropriated for railroad purposes by said company, and, as has been seen, this record conclusively shows that no right of way of any width has ever been acquired by the company over or across the lands in question. Such evidence, therefore, as was offered was tentative and hypothetical merely, and hence the same was very properly disregarded by the trial court. Nor do we find a scintilla of evidence in the abstract which even remotely bears upon the question of what is or would be the proper width of a right of way for said railway company at the point where its tracks cross the defendants' lands. In this condition of the evidence, this court is certainly not in a position to adjudicate upon either of the questions we are asked to retry.

Nor do we think the District Court erred in not taking cognizance of the matter of definitely locating and fixing the boundaries of a right of way for said railway company over and across the lands of the appellants, or in its refusal to consider the evidence as to the matter of the appellants' claims for damages as resulting from any appropriation of their lands by said railway company for right of way purposes. To have done so in a case where it is conceded that no such appropriation of appellants' lands was ever made would have involved a manifest absurdity. Aside from merely technical objections to the manner of procedure adopted by the appellants, we find no evidence in the record upon which an intelligent determination could be predicated, either with respect to definitely locating the boundaries of any railway right of way, or as to any damages which might result from any such purely imaginary right of way.

Nor is this court able to discover any error in the order of the trial court dismissing the Northern Pacific Railway Company as a party to the action. That company was not made a party by the plaintiff, for the obvious reason that its proposed right of way six feet in width as surveyed did not cross over any land belonging to the railway company. The lands in question were described in the complaint as lands belonging to these appellants, and the appellants by both their answers assert title and ownership of said lands in the appellants. No claim has ever been made by the railway company of any adverse ownership, title, or estate in the railway com-

pany. When compelled to come in as a party, the company from first to last assumed the attitude of having no interest whatever in the condemnation proceeding, and said company has wholly failed to assert any right to the damages awarded to these appellants, and wholly failed to assert any claim or title to the defendants' said lands. Nor upon this record could the railway company, or either of them, named in the record, claim damages on account of said condemnation for telephone purposes. The record is replete with evidence that the railway company has never acquired a right of way over or across the lands in question. This being so, said company has not as much as an easement in said lands.

Upon the conceded facts in this record, it conclusively appears that the controversy involved in the condemnation action, as between the original parties thereto, could have been and was fully adjudicated and determined without prejudice to any of the rights of these defendants or of either of the railway companies whose names appear in this record. This being true, the statute relied upon by the appellants' counsel is decisive authority against the appellants. Under the statute, it was the duty of the trial court to determine the original controversy without calling in additional parties. Such is the mandate of the statute cited by counsel. See Rev. Codes, § 5238. The learned trial court, in our judgment, was entirely right in refusing to enter upon and determine any collateral controversy which may exist between the appellants and said railway company, or either of them, arising from or out of any torts or trespasses committed upon their lands. The judgment of the court below will be made the judgment of this court. All the judges concurring.

(83 N. W. Rep. 215.)

ST. ANTHONY & DAKOTA ELEVATOR COMPANY *v.*s. BOTTINEAU
COUNTY.

Opinion filed May 29, 1900.

Distress of Personal Property for Taxes.

In case of bulky articles of personal property (a grain elevator, in this instance), a distress for taxes, good as against the taxpayer, may be made without an actual seizure of the property. It is sufficient if the officer holding the warrant give the taxpayer, or its agent in charge, notice of seizure, and properly advertise the property for sale.

Involuntary Payment—Recovery of Payment.

Where a tax collector, with the tax warrant in his possession, is in duty bound, under the law, to seize and sell property for the payment of delinquent taxes, and is attempting so to seize and sell personal property, and where, to avoid such seizure and sale, the taxpayer pays an illegal and void tax under protest, and with notice to the collector that action will be brought to recover the amount so paid, such payment is not voluntary, and may, in a proper action, be recovered. It is not necessary in such a case that the payment should be made, to release such personal property from actual detention on the part of the collector.

Appeal from District Court, Bottineau County; *Morgan, J.*

Action by the St. Anthony & Dakota Elevator Company against August Soucie and Bottineau County. Judgment for plaintiff. Defendants appeal.

Affirmed.

Bosard & Bosard, for appellant.

Illegal taxes voluntarily paid, even though paid under protest, cannot be recovered back. 2 *Desty on Tax'n*, 796; *Sonoma County Tax Case*, 13 Fed. Rep. 791; *Union Pacific Ry. Co.*, 98 U. S. 543; *Lamborn v. County*, 97 U. S. 181; *Wabaunsee County v. Walker*, 18 Kan. 431; *Babcock v. Fondulac*, 16 N. W. Rep. 625; *St. Joseph County v. Ruckman*, 57 Ind. 96; *De Baker v. Carillo*, 52 Cal. 473; *Bucknall v. Story*, 46 Cal. 580; *Shane v. St. Paul*, 26 Minn. 543; *Powell v. St. Croix County*, 46 Wis. 210; *Sanford v. New York*, 33 Barb. 147; *Budge v. City*, 1 N. D. 309. Payment is not compulsory unless made to release property from an actual existing duress imposed by the payee. *Baltimore v. Lefferman*, 45 Am. Dec. 146. Duress consists in unlawful detention of the property of a person. § 3845, Rev. Codes. And payment is not regarded as compulsory unless made to relieve property from actual duress. *Elson v. Chicago*, 89 Am. Dec. 363; *Vick v. Shinn*, 4 Am. St. Rep. 26; *Chafin v. McDonough*, 84 Am. Dec. 54; *Town v. Ackerman*, 15 Am. Rep. 323. The advertising of respondent's property for sale by the treasurer amounted to a mere threat to seize and sell and was not sufficient duress to render the payment voluntary. *Sonoma County Tax Case*, 13 Fed. Rep. 789; *Detroit v. Martin*, 34 Mich. 173; *Williams v. Corcoran*, 46 Cal. 556; *Bucknall v. Story*, 46 Cal. 589.

Cochrane & Corliss, for respondent.

The facts show that the county treasurer had distrained the plaintiff's elevator for the tax, had advertised the same for sale, and was about to sell it when a written protest was served upon him, and despite such protest he persisted in offering the elevator for sale and then, and only then, did plaintiff pay. This was not a voluntary payment. *Joanmin v. Ogilvie*, 52 N. W. Rep. 217; *Powder River Cattle Co. v. Board of Com'srs*, 45 Fed. Rep. 323; *Defremery v. Austin*, 53 Cal. 380; *Breucher v. Village*, 4 N. E. Rep. 272; *Babcock v. Township*, 31 N. W. Rep. 423; *Winser v. City*, 27 N. W. Rep. 241; *Shoup v. Willis*, 6 Pac. Rep. 24; *Ersikine v. Van Arsdale*, 15 Wall. 77; *Dunnell Mfg. Co. v. Newell*, 2 Atl. Rep. 766; *Union Pacific Ry. Co. v. Com'srs*, 98 U. S. 541. Payment of taxes to a collector who has a tax warrant in the form prescribed by law, is to be regarded as compulsory payment, and if the taxes were assessed without authority they may be recovered back although the party made no protest before payment. *Glass Co. v. Boston*, 4 Metc. 181; *Grim v. School District*, 57 Pa. St. 434; *Allen v. Burleigh*, 45 Vt. 202. It is settled doctrine that where an illegal and

void tax is paid to prevent a seizure and sale of the taxpayer's property, the one having apparent, colorable, or formal authority to make such seizure and sale, if the danger is imminent, and the payment is made under protest, the money so paid may be recovered back. 45 Am. Dec. 164, note; *Creamer v. Inhabitants*, 40 Atl. Rep. 555; *Joyner v. School District*, 3 Cush. 567; *Stowe v. Town*, 41 Atl. Rep. 1024; *Thompson v. City*, 72 N. W. Rep. 320; *Miner Lumber Co. v. City*, 56 N. W. Rep. 926; *Board of Com'srs v. Kansas City*, 46 Pac. Rep. 1013. It will be observed that among some of the cases above cited, are cases which hold that a mere protest and notice that suit will be brought suffice to make a payment involuntary. It is clearly the rule that if process to collect the tax must inevitably issue and distraint of the taxpayer's goods follow, the party need not wait the issuing of such process but may pay the tax in advance of the issue thereof, provided he serves a protest and declares his purpose to sue to recover back the tax. *Atchison Ry. Co. v. Com'srs*, 28 Pac. Rep. 999; *Atchison Ry. Co. v. City*, 28 Pac. Rep. 1000; *Rumford Chemical Works v. Reay*, 34 Atl. Rep. 814; *Allen v. City*, 45 Vt. 202; *Kansas Pacific Ry. Co., v. Com'srs*, 16 Kan. 587. That the payment is under duress when the property has been actually seized and is about to be sold, is recognized in all the cases. *Lindsay v. Allen*, 36 Atl. Rep. 840; *Roedel v. Village*, 66 N. W. Rep. 386. When a taxpayer is threatened with seizure of goods for the satisfaction of an illegal tax, he is without remedy. If the goods are seized he can not replevin them. If the goods are sold a valid title passes to the purchaser. No suit in equity will lie to enjoin the collection of a personal tax. The law considers that a person has an adequate remedy in his right to recover back the illegal tax. *Powder River Cattle Co. v. Com'srs*, 45 Fed. Rep. 323; *Dorvs v. City*, 11 Wall. 108; *Hannermikle v. Georgetown*, 15 Wall. 547; *Cooley on Tax'n*, 538; *Laird v. Pine Co.*, 75 N. W. Rep. 723; *Youngblood v. Sexton*, 32 Mich. 406; *Taylor v. Ry. Co.*, 88 Fed. Rep. 350; *Ogden City v. Armstrong*, 18 Sup. Ct. Rep. 98. The officer collecting the illegal tax is liable in an action brought by the taxpayer to recover the same. *Erskine v. Van Arsdale*, 15 Wall. 75; *Western Union Telegraph Co. v. Mayer*, 20 Ohio St. 521; *Steven v. Daniels*, 27 Ohio St. 527; *Dunnell Mfg. Co. v. Newell*, 2 Atl. Rep. 766; *Shoup v. Willis*, 6 Pac. Rep. 124; *Defremery v. Austin*, 53 Cal. 380; *Atwell v. Yeluff*, 26 Mich. 120; *Rumford v. Ray*, 34 Atl. Rep. 814; *Lindsay v. Allen*, 36 Atl. Rep. 840; *Wood v. Stirman*, 37 Tex. 584; *Powder River Cattle Co. v. Com'srs*, 29 Pac. Rep. 361; *Board v. Searight*, 31 Pac. Rep. 268. The county into whose treasury the officer pays the money is also liable for the illegal tax as well as the officer. *Dubois v. Com'srs*, 37 N. E. Rep. 1056; *Cooley, Tax'n*, 565; *Mecham v. Newport*, 40 Atl. Rep. 729; *Creamer v. Bremen*, 40 Atl. Rep. 555.

BARTHOLOMEW, C. J. Action by the St. Anthony & Dakota Elevator Company to recover from Bottineau county and from August

Soucie, as treasurer of Bottineau county, certain money paid by said company to said treasurer as and for taxes assessed against said company in said county in the year 1895. The case was tried to the court, and plaintiff was successful. The defendants bring the case to this court, but the only issue of fact that this court is asked to retry is whether or not the money so paid for taxes was paid under compulsion. The illegality of the tax is conceded. The testimony upon the controverted issue is uncontradicted, is brief, and may be thus summarized: "On the 30th day of December, 1896, the said treasurer served upon the agent of plaintiff at its elevator in the Village of Bottineau a notice as follows: "Notice is hereby given: That I, August Soucie, as the treasurer of the County of Bottineau, North Dakota, will on the 30th day of December, 1896, by virtue of the power in me vested by article 8, chapter 18, of the Political Codes, seize and take into my possession the following described property, to-wit: One elevator or warehouse; said grain elevator or warehouse being located on the right of way of the Great Northern Railway Company in the Village of Bottineau, in the County of Bottineau and State of North Dakota; said property being owned by and assessed to the St. Anthony & Dakota Elevator Company, of Botteau county. That said seizure was made to satisfy the delinquent taxes for the year 1895, together with the interest and penalty due thereon, from said St. Anthony & Dakota Elevator Co. to said County of Bottineau for all personal property of Elevator Co. taxed in said County of Bottineau. And that I shall, on Monday, the 11th day of January, A. D. 1897, at the hour of two o'clock p. m., at the front door of the court house in said county and state, proceed to sell the above-described personal property to satisfy the lien of said County of Bottineau against said property, and all personal property of said St. Anthony & Dakota Elevator Company for said delinquent taxes, as follows, to-wit: 1895. \$1,097.72; interest, \$65.96; penalty, \$32.96; amounting to \$1,196 and 51 cents,—together with all accruing costs of seizure and sale, at public auction, to the highest bidder, for cash. August Soucie, Treasurer of Bottineau County." The possession of the agent was in no manner disturbed by the treasurer, and the agent exercised full control of the elevator at all times to the date fixed for the sale. Notice of the sale was published as required by law. On the date fixed for the sale, January 11, 1897, and at the hour specified, the said treasurer offered the elevator for sale at the front door of the court house in said Village of Bottineau, at public auction. The agent of the plaintiff was present, and when bids were called for he stated to the treasurer that the taxes were illegal; and, the treasurer continuing to cry the sale, he handed him a written protest. This document was evidently prepared with care. It alleges that the assessment against the elevator company was illegal, and that the company was not the owner of any of the property upon which the alleged tax was extended. It protests against being required to pay

the same, and declares that, if compelled to pay the same in order to preserve its property, the elevator company will at once bring action against the treasurer and against the county to recover the amount so paid. When the protest was presented to the treasurer, he read sufficient of it to determine what it was, and then proceeded to cry the sale. Thereupon the agent paid the tax claimed. The treasurer had received no bid for the elevator; nor, so far as disclosed, was there any one present who desired to make a bid. The treasurer fully intended to sell the elevator as advertised, if the taxes were not paid, and he could make a sale. Under these facts was the money paid under compulsion?

That illegal taxes, voluntarily paid, although paid under protest, cannot be recovered, is elementary, and is conceded in this case. But courts have been much perplexed in determining just what facts and circumstances will serve to remove the payment from the voluntary class and make it involuntary. Appellants urge that there never was any seizure of property, and hence no detention, and they rely in part upon the notice served to show this to be true. The notice is certainly inartificial. It is dated December 30th, and declares that "I, August Soucie, as treasurer of the County of Bottineau, North Dakota, will on the 30th day of December, etc., seize and take into my possession the following described property, to-wit." And after describing the property it continues: "That said seizure was made to satisfy the delinquent taxes," etc. When construed together, we think it cannot be claimed for this notice that it shows that no seizure was made, but, rather, it declares a seizure then and there. But counsel contend that, because nothing was done corresponding with what the law requires an officer to do in making a levy under execution or attachment, therefore there never was any distress. The statute in force at that time (section 1237, Rev. Codes, 1895) declared that if taxes were not paid by October 1st, after they became due, "the treasurer is directed and required to collect the same by distress and sale." His general tax warrant was the only authority he required. There is an entire absence of all details in direction. But we know of no statute that requires the treasurer, in distraining property, to pursue the same course that must be pursued under execution. We do not think such ever was the law. In 9 Am. & Eng. Enc. L. (2d Ed.) 650, it is said, "No precise act or form of words is essential to a distress, and the distress may be made without actual seizure." In *Eames v. Mayo*, 6 Ill. App. 334, the articles were ponderous. They were looked at and listed, and a seizure declared, but no actual possession taken. It was held a good distress for rent by the landlord. In *Newell v. Clark*, 46 N. J. L. 363, the landlord inventoried the goods, and posted notice of distress upon the premises, and served same on tenant, but did not take possession of goods, but left them in the possession of the tenant, who sold them. Held a good distress. And to same effect in *Furbush v. Chappell*, 105 Pa. St. 187. The case of *Forth v. Pursley*, 82 Ill. 152, involved the legality of a

tax sale. The collector levied upon a portable sawmill. He did this by giving the statutory notice and advertising the property for sale. He did not take possession of the property, or interfere with its use by the parties in possession. The property was sold pursuant to the notice, and the contest arose between the former owner and the purchaser at the tax sale. The court held that as to parties whose right attached intermediate the distress and sale, actual possession was necessary, but as to the former owner, or any one claiming under him before the levy or after the sale, the absence of possession by the collector could not affect the validity of the sale. We think these cases abundantly establish the proposition that the distress in this case was sufficient to enable the treasurer to make a sale of the property that would pass a title good as against the plaintiff. If that be true, and the payment was made to prevent such sale, and it reasonably appeared that this was the only way to prevent the sale, then, clearly, the payment was compulsory. Indeed, in many cases much less has been required, to constitute the payment compulsory. True, it was said in *Baltimore v. Lefferman*, cited by counsel, and reported in 45 Am. Dec. 145, that "payment is not compulsory unless made to release person or property from an actual, existing duress imposed by the payee." That was an action to recover money expended in improving a water front in obedience to a demand of the proper official, acting under the authority of a city ordinance afterwards declared unconstitutional. It was not technically an action for the recovery of void taxes. The principle there announced has been applied in many other cases. It is undoubtedly the correct and prevailing doctrine in the great majority of instances where money has been wrongfully extorted. Certainly it is true in all cases where there is no assertion of liability against the person making the payment. It is also true in all cases where an asserted claim can only be established in court, because there the party will have his opportunity to defend. Hence threats of legal prosecution, however pronounced, can never render payment compulsory. *Benson v. Munroe*, 7 Cush. 125; *Dickerman v. Lord*, 21 Ia. 338; *Kohler v. Wells, Fargo & Co.*, 26 Cal. 606; *Town of Brazil v. Kress*, 55 Ind. 14; *Emmons v. Scudder*, 115 Mass. 367; *Harmon v. Harmon*, 61 Me. 227. This is as true in a tax demand as any other, if the demand must be established in court. *City of Marietta v. Slocomb*, 6 Ohio St. 471. This rule also holds in case of a threatened sale of realty for illegal taxes. Such sale does not pass any title. The party still has his day in court. *Stover v. Mitchell*, 45 Ill. 213; *Detroit v. Martin*, 34 Mich. 170; *Rogers v. Inhabitants of Greenbush*, 58 Me. 390; *Forrest v. Mayor, etc.*, 13 Abb. Prac. 350.

But this strict rule ought not to apply to cases of seizure or sale, or threatened seizure or sale, of personal property upon an illegal or void tax. The reasons are obvious. The right of possession or the title to the property cannot be tested, once a seizure is made. The sovereign taxing power of the state cannot be thus

impeded. A sale once made, and the title to the specific article is gone. If specific personal property cannot be retained or preserved save in the presence of actual duress, as that term is defined at common law, or that duress defined by our statute (section 3845, Rev. Codes) as sufficient to take away the element of consent in a contract, then useless expense will often be entailed, and injustice suffered. The almost uniform current of authority is the other way. In the valuable note to *Baltimore v. Lefferman*, *supra*, it is said at page 164: "The most numerous class of cases to which the doctrine as to recovery of involuntary payments is applied is that of illegal taxes. It is clearly settled doctrine that where an illegal and void tax is paid, to prevent a seizure and a sale of the taxpayer's property, to one having apparent colorable or formal authority to make such seizure and sale, if the danger is imminent and the payment is made under protest, the money so paid may be recovered back." A large array of authorities is cited, and we add others. As early as the case of *Preston v. City of Boston*, 12 Pick. 7, it was said by Chief Justice Shaw: "But the warrant to a collector, under our statute for the assessment and collection of taxes, is in the nature of an execution running against the person and property of the party, upon which he has no day in court,—no opportunity to plead and offer proof, and have a judicial decision of the question of his liability. Where, therefore, a party not liable to taxation is called on peremptorily to pay upon such a warrant, and he can save himself and his property in no other way than by paying the illegal demand, he may give notice that he so pays it by duress, and not voluntarily, and, by showing that he is not liable, recover it back, as money had and received." In that case no property had been seized. No warrant of collection had ever in fact issued, but the plaintiff had been informed by the collector that it would be issued, and the court said: "Under these circumstances the money was paid, and we think it cannot be considered as a voluntary payment, but a payment made under such circumstances of constraint and compulsion, and with such notice on his part that it was so paid, that, on showing that he was not liable, he may recover it back, in this action, from the defendants, into whose treasury it has gone." See, also, the case of *Boston & S. Glass Co. v. City of Boston*, 4 Metc. (Mass.) 181, where the reason for the exception to the rule in tax cases is clearly set forth. In *Claffin v. McDonough*, 33 Mo. 412, the court said: "To constitute duress, there must be a seizure of the property, or arrest of the person, or a threat or attempt to do one or the other, or facts must be stated which tend to show, or which warrant the conclusion, that such an arrest or seizure can be avoided only by the payment of the tax demanded." *Howard v. City of Augusta*, 74 Me. 79, was a personal property tax case. No seizure had been made, and objection was made to the form of the protest. The court said: "But in fact no protest was necessary. As we have

seen, the plaintiff was, or stood in the place of, the owner. If we can believe the collector,—and there is no reason to doubt his testimony,—he was prepared to and would have made the levy but for the payment. That the full amount paid was necessary to protect the property from distress. It was, then, a compulsory payment. A person is not bound to wait until his property is actually taken by a legal process,—one which he cannot properly resist,—and costs made, before he pays the claim upon it. It is sufficient if the circumstances are such as fairly lead to the conclusion that the waste and expense can be avoided only by payment.” In *Parcher v. Marathon Co.*, 52 Wis. 388, 9 N. W. Rep. 23, also a personal property tax case, the court said: “And, further, to constitute compulsion of legal process, it is not essential that the officer has seized, or is immediately about to seize, the property of the payer by virtue of his process. It is sufficient if the officer demands payment by virtue thereof, and manifests an intention to enforce collection by seizure and sale of the payer’s property at any time.” Likewise, in *Allen v. City of Burlington*, 45 Vt. 202, no warrant had issued, and no immediate levy was expected. It was simply a case where the party had good reason to suppose that in due course of time the warrant would issue, and the taxes be enforced, with costs. His payment was held to be compulsory. In *Chemical Works v. Ray* (R. I.) 34 Atl. Rep. 814, the payment of an alleged illegal tax was made under protest six months before a warrant could legally issue, but it was held compulsory. These cases but illustrate the doctrine announced by the Federal Supreme Court in *Erskine v. Van Arsdale*, 15 Wall. 77, 21 L. Ed. 63, where it is said: “Taxes illegally assessed and paid may always be recovered back, if the collector understands from the payer that the taxes are regarded as illegal, and that suit will be instituted to compel the refunding of them.” The authorities along this line are becoming very numerous, but we have cited sufficient to show that, had this concededly illegal and void tax been paid under the protest that was made in this case, the amount could be recovered, although there had been no seizure or attempted seizure, and no threatened sale. Plaintiff had a right to assume that the treasurer would perform his duty as enjoined by law, and enforce the collection of the tax, with costs. We need pursue the subject no further. We hold that payment was made under legal compulsion. The judgment of the District court is made the judgment of this court, and is in all things affirmed. All concur.

(83 N. W. Rep. 212.)

STATE OF NORTH DAKOTA v. E. H. BELYEA.

Opinion filed June 2, 1900.

Murder—Information—Duplicity.

The information charged, or attempted to charge, the defendants with the crime of murder in the second degree committed by the

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defendants while they were engaged in the commission of the felony defined by section 7177, Rev. Codes, relating to the crime of producing or attempting to procure the miscarriage of a woman pregnant with child. The facts constituting the offense defined in section 7177 were set out in the information. *Held*, that the information did not charge two distinct and independent offenses, and hence the demurrer thereto upon the ground of duplicity was properly overruled.

Facts Constituting Lesser Offense Included in Charge of Murder.

Held, further, that all averments in the information relating to the subordinate felony were properly and necessarily inserted in the information as descriptive of the major offense, that of murder in the second degree.

Murder in Second Degree—Subordinate Felony.

Held, further, that the subordinate felony defined by section 7177, Rev. Codes, is foreign to, and is not generically connected with, the offense of murder in the second degree, and hence said subordinate offense is not necessarily included in the commission of the crime of murder in the second degree, as defined by subdivision 3, § 7058, *Id.*

Verdict Illegal.

The jury returned the following verdict in response to certain instructions given to them by the trial court, and pursuant to a form of verdict furnished the jury by said court: "We, the jury, find the defendant E. H. Belyea guilty of the crime of unlawfully procuring an abortion, as charged in the information." *Held*, that such verdict is illegal, and wholly unauthorized, in a case where the information charges the crime of murder in the second degree perpetrated while defendant is engaged in the commission of an independent felony. *Held*, further, that the verdict erroneously assumed that the offense referred to in the verdict is necessarily committed in the commission of the offense of murder in the second degree.

Information Criticised.

The information criticised with respect to certain phraseology improperly employed in charging the crime of murder in the second degree.

Appeal from District Court, Ramsey County; *Morgan, J.*

E. H. Belyea was convicted of crime, and appeals.

Reversed.

Joseph Denoyer, M. H. Brennan, and Cochrane & Corliss, for appellant.

As against defendant's demurrer, the information was sustained under subd. 3, § 7058, Rev. Codes. The information does not, in terms, cover the class of crime this section was intended to reach; and the language of the information is not broad enough to cover this section. The information does not aver that the acts were perpetrated without design to effect death and while defendant was engaged in the commission of a felony. *State v. Emerich*, 5 Laws. Cl. Df. 1116, 87 Mo. 110. As a rule of criminal pleading, an indictment bottomed on a statute must contain all those forms of expression, those descriptive words which bring the defendant precisely

within the definition of the statute. *State v. Emerich*, 5 Laws. Cl. Df. 1116; *State v. Helm*, 6 Mo. 264; 9 Am. & Eng. Enc. L. 626, note 1; *Nichols v. State*, 46 Miss. 284; Kerr on Hom., § § 247 and 248. The legislature having declared when the death of a pregnant woman is accomplished by an attempt to produce a miscarriage upon her, under certain circumstances, that it is manslaughter only, no form of allegation varying the facts can make the act murder. By § 7086, the intent to destroy a "quick child" is the feature which makes the offense of abortion manslaughter in case death results to either the child or mother. It is strange if a person, when he only intends a miscarriage on a pregnant woman, which involves no attempt to take life, the foetus not being alive (§ 7177), can, in case death ensues, be held for murder; while, if he intends to destroy a live child the offense is manslaughter only. "In other words, if there is no intent to kill, but death ensue, the defendant may be punished by imprisonment for not less than ten years, and from that to thirty years (§ 7069); but if he intends to kill and succeeds he can only get from five to fifteen years (§ 7070). *Lohman v. People*, 1 N. Y. 379, 49 Am. Dec. 341; Kerr on Hom. § 161; *State v. Emerich*, 5 Laws. Cl. Df. 1117; *Com. v. Railing*, 113 Pa. St. 37, 6 Am. Cl. Rep. 7, 1 Atl. Rep. 314, 4 Atl. Rep. 459; *State v. Cooper*, 22 N. J. L. 52, 3 Laws. Cl. Df. 343; *Evans v. People*, 49 N. Y. 86; *People v. Olmstead*, 30 Mich. 431; *State v. Smith*, 54 Am. Dec. 607, 5 Laws. Cl. Df. 981, 33 Me. 48. It was not an offense at common law to produce an abortion upon a pregnant woman, with her consent, if she was not quick with child. *Mitchell v. Com.*, 39 Am. Rep. 227; *Com. v. Bangs*, 9 Mass. 387; *Com. v. Parker*, 9 Metc. 263; *State v. Cooper*, 51 Am. Dec. 249; *People v. Sessions*, 26 N. W. Rep. 291; *Smith v. State*, 54 Am. Dec. 607; Taylor, Med. Jur. 526. The legislature created two classes of offenses. The attempt to produce a miscarriage upon a pregnant woman, intending miscarriage only, and an attempt to produce a miscarriage upon a woman pregnant with a quick child, with intent to destroy the child, where death results. The offense originates in the statute defining it. *People v. Olmstead*, 30 Mich. 431. The information is insufficient under § 7177. Rev. Codes, because it charges that the use of an instrument was not necessary to save life and does not aver that the miscarriage was unnecessary. *State v. Stevenson*, 68 Vt. 527, 35 Atl. Rep. 470; *Bassett v. State*, 41 Ind. 313; *Willie v. State*, 46 Ind. 363; *State v. Lee*, 37 Atl. Rep. 79. The offense is named in the caption of the information as murder. The facts charged in the body of the information do not indicate to defendant that he is accused of an attempt to procure a miscarriage. A proper designation of the crime is essential to a valid information. § 8040, Rev. Codes; Subd. 2, § 8039, Rev. Codes; § 8047, Rev. Codes; *Johnson v. State*, 26 Ark. 329; *Brooks v. Com.*, 32 S. W. Rep. 403; *People v. Dumar*, 106 N. Y. 509. This variance between the crime charged and the facts charged is fatal

to the information. *People v. Maxon*, 57, Hun. 367, 10 N. Y. Supp. 593; *People v. Dumar*, 106 N. Y. 510, 13 N. E. Rep. 325; *Brooks v. Com.*, 98 Ky. 143, 32 S. W. Rep. 403. The jury were instructed that this information charged both the crime of murder in the second degree, and also the crime of abortion. This ruling of the trial court became the law of the case. *Rochr v. Ry. Co.*, 7 N. D. 97, 72 N. W. Rep. 1084. And the information is bad for duplicity. § 8042, Rev. Codes; *Territory v. Dooley*, 4 Mont. 295, 1 Pac. Rep. 747; *State v. Marcks*, 3 N. D. 532; *State v. Smith*, 2 N. D. 515. The information cannot be sustained under Subd. 3, § 7058, Rev. Codes, because it contains no averment that the act was perpetrated without design to effect death. *State v. Emerich*, 5 Laws. Cl. Df. 1113. And also because it does not aver that the act was done while defendant was engaged in the commission of a felony, and a felony other than the one with which he is charged. *Foster v. People*, 50 N. Y. 603; *State v. Shock*, 3 Am. Cl. Rep. 186, 192, 68 Mo. 555; *People v. Butler*, 5 Park. 377; *People v. Rector*, 19 Wend. 605; *People v. Skeehan*, 49 Barb. 217. The verdict is a nullity because not responsive to the indictment. Abortion is not named as a crime in the statute. *Flourien v. State*, 8 Ohio Dec. 171; Am. Dig. 1898, Title Abortion, § 6. Punishment can only be imposed when the information is based upon the statute under which the sentence is imposed. *Boody v. People*, 43 Mich. 34, 4 N. W. Rep. 573; *People v. Jones*, 14 N. W. Rep. 543, 49 Mich. 591. Unlawfully procuring an abortion was not the crime named in the information. *Brooks v. Com.*, 32 S. W. Rep. 403. The statute contemplates two kinds of verdict, general and special. Under a plea of not guilty a conviction of the offense charged in the information is had by the simple verdict "guilty." § 8235, Rev. Codes. When the crime is distinguished into degrees, on conviction, the jury must find the degree. § 8242, Rev. Codes. Unlawfully procuring an abortion is not a degree of homicide. *State v. Marcks*, 3 N. D. 537; *State v. Johnson*, 3 N. D. 150. The statute authorizing a conviction of any offense included in that with which defendant is accused, relates only to that class of offense of which there are different degrees, and has no application to a case where the crime charged has no degrees. *State v. Johnson*, 3 S. W. Rep. 868; *State v. Burke*, 2 S. W. Rep. 10; *People v. Keiffer*, 18 Cal. 637; *State v. White*, 45 Ia. 325; *Turner v. Muskegon*, 50 N. W. Rep. 310; *Territory v. Dooley*, 1 Pac. Rep. 747. Where offenses are defined as distinct crimes in the statute under indictment for one, a conviction of the other cannot be had. *State v. Pierce*, 4 Blackf. 318; *State v. Shear*, 8 N. W. Rep. 287; 1 Whart. Cl. L. 564; *Kinkelly v. State*, 43 Wis. 604; *State v. Hooks*, 33 N. W. Rep. 57; *State v. Yanta*, 38 N. W. Rep. 333; 1 Bish. Cl. L. § 704. The verdict is not sufficient as a special verdict. § 8236, Rev. Codes; *Miller v. People*, 25 Hun. 473; *People v. Wells*, 8 Mich. 103; *Com. v. Chatham*, 88 Am. Dec. 539; *State v. Spray*, 18 S. E. Rep. 700;

State v. Ewing, 13 S. E. Rep. 10. The repeated assertion of matters by the attorney general in his closing argument, of which there was no proof in the case, were prejudicial. *People v. Fielding*, 158 N. Y. 542, 46 L. R. A. 661, note; *People v. Aikin*, 33 N. W. Rep. 821; *Exon v. State*, 26 S. W. Rep. 1088; *Clarke v. State*, 5 S. W. Rep. 115. The testimony of Sampson as to his conversation with defendant's brother, in October, that a prescription was given to produce an abortion, and the instruction of defendant's brother as to the girl's treatment not having been made in the presence or hearing of defendant, was highly prejudicial. *Com. v. Felch*, 132 Mass. 32; *Owens v. State*, 74 Ala. 401; *State v. Weaver*, 57 Ia. 730; *Binns v. State*, 57 Ind. 46; *Cox v. State*, 8 Tex. App. 354; *State v. Moberly*, 26 S. W. Rep. 356; *People v. Erwin*, 20 Pac. Rep. 59; *Williams v. Dickinson*, 9 South. Rep. 851; *McGraw v. Com.*, 20 S. W. Rep. 279; *Train v. Taylor*, 4 N. Y. Supp. 493.

P. J. McClory, State's Attorney, and *John F. Cowan*, Attorney General, for the State.

The information sufficiently charges murder in the second degree within the meaning of Subd. 3, § 7058, Rev. Codes; *State v. Moore*, 25 Ia. 128. And under the information it was competent for the jury to convict of the offence described in § 7177, Rev. Codes. *State v. Maloney*, 7 N. D. 119, 72 N. W. Rep. 927; § 8244, Rev. Codes; *State v. Young*, 40 Pac. Rep. 659; *Rhodes v. State*, 27 N. E. Rep. 866. The indictment is not bad for duplicity because in setting out the manner in which it was committed, or the means employed for its accomplishment, facts are charged which also constitute another crime under the statute. *Herron v. State*, 42 N. E. Rep. 541; *Thomas v. State*, 26 S. W. Rep. 729; *Thompson v. State*, 34 S. W. Rep. 639, 10 Enc. Pl. & Pr. 534; *Byrne v. State*, 12 Wis. 519; *Hauk v. State*, 46 N. E. Rep. 127; *Farrell v. State*, 24 Atl. Rep. 723; *State v. Johnson*, 30 N. J. L. 185; *Scott v. People*, 30 N. E. Rep. 329; *State v. Watson*, 1 Pac. Rep. 770; *McKinsie v. State*, 40 Am. St. Rep. 795; *State v. Burrell*, 8 Pac. Rep. 470; *Benn v. State*, 58 Am. Dec. 238; *People v. Aikin*, 11 Am. St. Rep. 512; *State v. Belle*, 92 Am. Dec. 661; *People v. Aultman*, 47 N. E. Rep. 180; *Lehman v. People*, 48 Am. Dec. 340.

WALLIN, J. The defendant was charged with the crime of murder in the second degree by an information filed in the District Court by the state's attorney of Ramsey county. After a plea of not guilty, the issues were tried by a jury, and the following verdict was returned into court and recorded: "We, the jury, find the defendant E. H. Belyea guilty of the crime of unlawfully procuring an abortion, as charged in the information." Upon said verdict the trial court, on July 8, 1899, entered a judgment of conviction, and thereby sentenced the defendant to serve a term of three years at hard labor in the penitentiary at Bismarck. The information upon which the defendant was tried and convicted is as follows: "P.

J. McClory, as state's attorney in and for the County of Ramsey, State of North Dakota, as informant, here in open court, in the name and on behalf and by the authority of the State of North Dakota, gives this court to understand and be informed that heretofore, to-wit: on the sixth day of January, A. D. 1899, at the County of Ramsey and State of North Dakota, one E. H. Belyea, and Albert Sampson, late of said county and state aforesaid, did commit the crime of murder, committed as follows, to-wit: That on the first day of January, A. D. 1899, at the City of Devils Lake, in said county and state, the said E. H. Belyea and Albert Sampson did then and there, unlawfully, maliciously, willfully, and of their malice aforethought, employ and use a certain instrument, to this informant unknown and not ascertainable, in and upon the person of one Julia Solberg, who was then and there a woman pregnant with child, and did then and there unlawfully, maliciously, willfully, and of their malice aforethought introduce said instrument into the womb of said Julia Solberg, with intent then and there to procure and produce the miscarriage and abortion of the said Julia Solberg; the said E. H. Belyea and Albert Sampson then and there well knowing that the use of the said instrument would produce such miscarriage and abortion, and it not being necessary to the preservation of the life of the said Julia Solberg, and, by means and in consequence of the use and employment of the said instrument by the said E. H. Belyea and Albert Sampson in and upon the person of the said Julia Solberg, she, the said Julia Solberg, then and there being wounded of her body, from then and until the 6th day of January, A. D. 1899, in the county and state aforesaid, did languish, and at the same time and place she, the said Julia Solberg, of the mortal wound aforesaid died, and the said E. H. Belyea and Albert Sampson, in the manner and by the means aforesaid, her, the said Julia Solberg, did unlawfully, maliciously, feloniously, willfully, and of their malice aforethought kill and murder, and in this did commit the crime of murder in the second degree; this contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of North Dakota. Dated at Devils Lake, Ramsey county, North Dakota, May 4, A. D. 1899." To this information defendant demurred, assigning several of the statutory grounds of demurrer, including the ground of duplicity, and the ground that the facts stated do not constitute a public offense. The demurrer was overruled. After the verdict was returned, and prior to the sentence, a motion for a new trial and a motion in arrest of judgment were interposed in defendant's behalf. Both motions were denied by the trial court.

The record in the case, as transmitted to this court, is voluminous, and embraces a statement of the case, including the evidence and numerous exceptions, and counsel for the appellant in their brief filed in this court have made numerous assignments of error based upon exceptions found in the record. But in disposing of the case this court has not found it necessary to rule upon any of the excep-

tions or assignments of error save those which relate to the verdict, and to certain instructions given to the jury by the trial court relating to the verdict. The record embraces the following recital: "That after twenty-four hours' deliberation the jury returned into court and announced the following verdict: 'We, the jury in the above-entitled action, find the defendant E. H. Belyea guilty of unlawfully producing an abortion. C. B. Kendall, Foreman.' That the court refused to accept said verdict, or to record the same, but instructed the jury orally that he had prepared another form of verdict, which was submitted to them, and requested them to retire and consider their verdict further. That thereafter, and on the same day, to-wit: June 24th, the defendant and his counsel being present in court, and also counsel for the state, the court directed the bailiffs in charge of the jury to bring them into court. The jury being brought into court, and the roll of jurors called by the clerk, the court inquired of the jury, 'Have you agreed upon a verdict?' To which C. B. Kendall, a member of the jury, replied, 'We have not, your honor.' Thereupon the court instructed the jury that the substituted form of verdict which he had handed them did not amount, if agreed upon, to a conviction of the defendant of any degree of homicide, but that the same amounted to an acquittal of the charge of murder and manslaughter, and requested the jury to retire for further deliberation. The defendant, by his counsel, then and there excepted to the remarks of the judge on the ground and for the reason that the jury had not asked for further instructions, and that they had been called into court by the court and without any request upon their part, which exception was allowed. That thereafter, and within the space of five minutes, the jury returned into court, and the roll of the jury having been first called, and all the jurors reporting present, by their foreman they report the following verdict: 'We, the jury, find the defendant E. H. Belyea guilty of the crime of unlawfully procuring an abortion, as charged in the information. C. B. Kendall, Foreman,'—which verdict was received and recorded, the jury polled, and, each member of the jury answering that the verdict as read was his verdict, the jury were discharged."

Exception is taken to the charge of the trial court as embodied in the following instruction given to the jury: "The crime of procuring an abortion as a lesser crime than the crime of murder in the second degree, and is necessarily included in the charge of murder in the second degree contained in the information; so that the information charges the crime of procuring an abortion by means of instruments." This instruction, in effect, was repeated elsewhere in the charge. But, before taking up either of the instructions to the jury or the verdict, it will be necessary to refer briefly to the nature of the accusation against the defendant.

The information, in terms, names the offense which is embodied in it as murder, and in its concluding sentence the offense is designated as murder in the second degree. The information is obviously

and avowedly framed with reference to subdivision 3, § 7058, Rev. Codes, which declares that homicide is murder "when perpetrated without any design to effect death by a person engaged in the commission of any felony." No claim is made that the offense of murder in the first degree is charged, and the respondent's counsel in their brief expressly disclaims any intention of setting out the offense of abortion as defined by section 7086, Id. Neither the allegations of the information nor the evidence offered at the trial would warrant a conviction under the section last cited, inasmuch as the condition of pregnancy with a quick child is neither alleged nor shown to exist in this case. The theory of the prosecution is that the death of Julia Solberg was brought about by the defendants' agency, while defendants were engaged in the commission of a felony which is defined by section 7177, Id. The crime defined by that section does not include an attack upon the life of a quick child, nor is it necessary to complete such offense that death either to a pregnant woman or to her child should transpire. Nor is it essential to the crime that any miscarriage should be produced. Under section 7177, Id., if drugs are prescribed or administered to a pregnant woman, or if such woman is advised to take any drug or substance, or if instruments are used upon such woman, "with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life," the offense defined would be established.

The information is open to criticism on account of its improper and confusing use of the words "miscarriage" and "abortion." These terms are not interchangeable terms, within the meaning of the Criminal Code of this state. Section 7177 does not contain the term "abortion," nor do the acts referred to in that section refer to any attempt to procure an abortion. "Miscarriage" is the word employed in section 7177, and that term denotes, and must denote, when construed with reference to section 7086, bringing forth the foetus before it is capable of living. This meaning is also strictly accurate in a scientific sense. See And. Law. Dict. p. 6.

The information is faulty, and, under some authorities, would be held demurrable, by reason of the omission to state that the homicide was committed "without any design to effect death;" nor does the charge include a statement, in terms, that the homicide occurred while the defendants were engaged in the commission of any felony. These omissions are serious faults in an information charging a felonious homicide. Upon this point, see *State v. Emerich*, 87 Mo. 110.

The charge is further vulnerable to criticism on account of the repeated use of words and phrases which are specifically appropriate to an accusation of murder in the first degree, and hence are such expressions as are confusing and misleading when employed in stating another offense. Reference is here made to the repeated employment of the phrase "maliciously, willfully, and of their malice aforethought." These words import and correctly describe a deliberate

homicide; in other words, they constitute the best possible description of motive in the crime of murder in the first degree. Nor are such words either necessary or proper in describing the crime defined by section 7177, *supra*. To that offense "malice aforethought" is not essential. On the contrary, that statutory crime may be fully consummated without any criminal purpose, and by one animated only by kindly motives. The offense is committed if the designated means are used upon a pregnant woman with the intent to procure the miscarriage of such woman when such miscarriage is not in fact necessary to save the life of the woman. The law leaves it for a jury to determine whether or not any miscarriage was necessary to save the life of the pregnant woman, and, if in the judgment of 12 men a miscarriage of the woman was not necessary to save her life, a verdict of guilty may be returned regardless of the motives governing the accused. It is therefore entirely clear that words which are adapted only to a description of murder in the first degree are wholly out of place and confusing when used to describe the minor offense defined in section 7177.

Again, it is essential, in charging the offense defined in the section last cited, to state that a miscarriage was not necessary to save the life of the woman who was operated upon. See *Bassett v. State*, 41 Ind. 303; *Willey v. State*, 46 Ind. 363; *State v. McIntyre*, 19 Minn. 93 (Gil. 65). This averment should be made in terms which are direct and certain, nor should it be set out parenthetically or in ambiguous terms. A scrutiny of this information discloses that this material averment, if made, is set out in ambiguous terms, and in a parenthetical clause of the information. From the language employed it will be found difficult to say whether the use of the instrument was unnecessary or whether the miscarriage was unnecessary. All such parenthetical and ambiguous language is in violation of a settled rule of criminal pleading which demands that all essential averments should be set out in language which is both direct and certain. But in the case at bar we have no occasion to rule upon any doubtful question, and hence we shall for the purposes of the case assume, without deciding the point, that the information sufficiently charges the crime of murder in the second degree.

It is our opinion that the trial court did not err in overruling the demurrer to the information based upon the ground of duplicity. It is true that the facts stated in the information, when liberally construed, amount to a description of two offenses, viz: the offense of murder in the second degree, and the minor offense defined in section 7177. But in this information there is manifested an obvious purpose to charge the crime of murder in the second degree, and that crime was named in terms as the crime actually committed by the defendants. In setting out this crime, it was essential to set out such facts as were necessary to show that the homicide was unintentional, and that it resulted as an incident while defendants were engaged in the commission of a felony which was collateral to the homicide, and

which felony was not either of the aggravated felonies which under section 7065 are associated with the crime of murder in the first degree. To bring the acts done by the defendants within the provisions of the statutes which define murder in the second degree, committed while the defendants were engaged in the commission of a felony, it became necessary to set out the facts and circumstances constituting the felony in the commission of which the defendants were engaged when the unintentional homicide occurred. For this purpose, and this alone, the information, we think, necessarily embodied a statement of the facts constituting the subordinate felony. If we are correct in this view, it will follow that all the averments embraced in the information which relate to the subordinate felony are strictly referable to the major offense, and are averments essentially descriptive of the major offense. We have no doubt that this is the proper view, and hence we conclude that the information does not contain a statement of more than one offense, within the meaning of the statute which forbids a charge of two offenses in the same indictment or information. See *Carpenter v. People*, 64 N. Y. 483.

The offense of murder in the second degree is named as the offense charged against the defendants, and no other crime or offense is named. If the prosecution in framing this information contemplated a conviction for the minor felony, which is an independent offense separate from, and not generically connected with, any homicide, it would, at least, have been necessary to name the minor offense, and give the defendants an opportunity to plead to the same. True, such a design would be in the teeth of the statute, which forbids a charge of more than one offense in the same indictment. See upon this point the learned opinion of Ex-Chief Justice Corliss in *State v. Smith*, 2 N. D. 515, 52 N. W. Rep. 320. But, if this statutory obstacle could by any possibility be overcome, it would still be necessary to describe the minor felony in language which would be both direct and certain as to the offense charged and as to the facts constituting the offense. As to this necessity, see the following authorities: *Brooks v. Com.* (Ky.) 32 S. W. Rep. 403; *People v. Maxon*, 57 Hun. 367, 10 N. Y. Supp. 593; *People v. Dumar*, 106 N. Y. 502, 13 N. E. Rep. 325. It is superfluous to say that this information with regard to the minor felony, considered as an independent crime, is not direct and certain with reference either to the offense charged or to facts constituting such offense. The offense defined in section 7177 is not named, and the facts constituting such offense, as stated in the information, are blended with other averments of fact which are used and intended to be used in stating another offense, *i. e.* the offense of murder in the second degree. Such statements of fact are therefore quite the reverse of definite and certain, when scrutinized with reference to a claim that the same are made for the purpose of charging these defendants with an independent felony.

Reverting, now, to the instructions given to the jury, and to the

verdict, which manifestly was returned in response to specific instructions, it will be necessary to construe certain sections of the Code of Criminal Procedure. Section 8242, Rev. Codes 1895, declares: "Whenever a crime is distinguished into degrees, the jury, if they convict the defendant, must find the degree of the crime of which he is guilty." Section 8244 is as follows: "The jury may find the defendant guilty of any offense the commission of which is necessarily included in that with which he is charged in the information or indictment, or of an attempt to commit the offense." The provisions of section 8242 can have no application to the case at bar, and there is no claim made that said section can apply to this case. As has been seen, the crime charged is murder in the second degree, which crime is not susceptible of division into degrees, and is not so distinguished by any provision of the Code. Hence the verdict could not have been returned with any reference to said section of the Code. If the verdict can be sustained (inasmuch as its legal effect is to exonerate the accused of the charge actually made in the information), recourse must be had to the provisions of section 8244. Tested by that section, we are clear that the verdict is illegal and voidable. The verdict assumes to find the defendant Belyea guilty of a felony, the commission of which, in our opinion, is not necessarily included in the crime of murder in the second degree, with which he was charged. The crime of procuring an abortion, as defined in section 7177, *supra*, whether committed as charged in the information or otherwise, is an offense not generically associated with the crime of murder in the second degree. That crime, as we have shown, is one which does not include an attack upon human life, nor does it include any attempt to destroy the life of any living foetus. It is true that the charge in the information necessitated the proof and allegation of the fact that the homicide in question was committed by the defendant's agency while engaged in the commission of the offense defined in section 7177, which offense is one which in its perpetration involves a serious hazard to human life. But this circumstance is adventitious. The crime charged can be committed if an accidental death results by defendant's agency while he is engaged in the commission of any felony whatsoever, except those committed in connection with the crime of murder in the first degree. This court has had occasion to put a construction upon the provisions of section 8244 of the Revised Codes of 1895 in two cases. See *State v. Marcks*, 3 N. D. 533, 58 N. W. Rep. 25, and *State v. Johnson*, 3 N. D. 150, 54 N. W. Rep. 547. These are not homicide cases, and hence not strictly in point. Nevertheless, they may be cited as illustrations of the rule governing in the exclusion and inclusion of offenses under the provisions of the section we are discussing. The crucial test is well stated in *Cameron v. State*, 13 Ark. 712. The court in that case say "that upon an indictment for a felony the accused may be convicted of a misdemeanor where both offenses belong to the same

general class, where the commission of the higher may include the commission of the lower offense, and where the indictment of the higher offense contains all the substantive allegations necessary to let in proof of the misdemeanor." See, also, *Guest v. State*, 19 Ark. 406. This rule of inclusion and exclusion is stated and applied with admirable discrimination in the case of *State v. Shock*, 68 Mo. 552. See, also, *State v. Sloan*, 47 Mo. 604; *Dedieu v. People*, 22 N. Y. 178; *People v. Rector*, 19 Wend. 569. Our conclusion, based upon the rule of law embodied in these authorities, is that the verdict returned in this case was not responsive to the charge against the accused, and that the trial court erred in instructing the jury to the effect that the verdict actually returned would be proper under the information. The judgment of the District Court is reversed, and a new trial ordered. All the judges concurring.

(83 N. W. Rep. 1.)

M. C. CLARKE AS RECEIVER *vs.* MATHIAS OLSON, *et al.*

Opinion filed August 15, 1900.

Building and Loan Association—Discount of Shares.

A stockholder in a building and loan association, owning 16 shares of stock, received from the association the sum of \$800 in cash, and executed to the association his bond for \$1,600, being the amount received and the premium bid therefor, due in nine years from date, with interest upon \$800 at 6 per cent. per annum. The condition recited that the money was advanced by way of anticipation of the value of the stock at maturity; that the bond might be satisfied by paying the face thereof, or by maturing the said 16 shares of stock and surrendering the stock. The obligor bound himself to pay \$9.60 per month as dues on said stock until the same reached maturity or par, but the bond provided that in case of default the obligee might declare the whole bond due, and sue thereon and recover the sum of \$1,036.80, as liquidated damages for the breach of said bond, less the amounts that had been paid as monthly dues on stock. The amount stipulated as damages covered the monthly dues for a period of nine years. The bond was secured by mortgage. In an action brought by a receiver of the association to foreclose, *held*, that the transaction was a discount of the shares, and not a loan of money, and that the mortgage secured the payment of the monthly dues for the period of nine years, and that all monthly dues paid must be deducted from the amount stipulated, and judgment rendered for the remainder.

Rights of Parties—Action by Receiver.

Where the full sum so secured had been paid as and for monthly dues upon said stock before the receiver was appointed, said receiver can recover nothing upon the bond and mortgage. But, if the stock of the defendant had not in fact been matured by such payments, defendant's liability upon his original stock-subscription contract remained in full force, and the receiver has the same rights thereunder as against the defendant that he has to collect the unpaid stock subscription of any non-borrowing stockholder, and the principle of mutuality is not affected by the bond and mortgage.

Deposit of Securities as Condition to Doing Business.

Where a building and loan association desires to do business in a state other than that in which it is chartered, and is authorized by its charter so to do, and in order to do so deposits, in compliance with the laws of such other state, its securities, in a specified amount, with the treasurer of such state, to be held in trust for the benefit of the shareholders and creditors in such state, and receives its license from such state to transact business therein, and so transacts business for a number of years, such association cannot, upon subsequent insolvency, nor can a shareholder not resident of such other state, plead that the act of the association in making such deposit of securities was ultra vires.

Appeal from District Court, Barnes County; *Glaspell, J.*

Action by M. C. Clarke, as receiver of the American Savings & Loan Association, against Mathias Olson and others. Judgment for plaintiff, and defendants appeal.

Modified.

Morrill & Engerud, for appellant, cited *Lewis v. Association*, 73 N. W. Rep. 793; *Wilcox v. Smith*, 78 N. W. Rep. 217; *Hale v. Cairns*, 77 N. W. Rep. 1010, 8 N. D. 145.

Cochrane & Corliss, for respondent.

Payments made upon stock that was pledged as collateral security for the payment of the loan does not constitute payment upon the loan. The purchasing of the stock and the borrowing of the money were distinct and separate transactions. *Hale v. Cairns*, 8 N. D. 145; *Endlich Building Ass'n.*, Secs. 447, 448, 452, 478; *Pioneer S. & L. Co. v. Cannon*, 36 S. W. Rep. 386; *Sappington v. Actna Loan Co.*, 76 Mo. App. 242; *Southern B. & L. Ass'n. v. Anniston*, 15 South. Rep. 173; *Loan Ass'n. v. Hornbacker*, 42 N. J. L. 635; *Post v. Mechanics' B. & L. Ass'n.*, 37 S. W. Rep. 216, 4 Am. & Eng. Enc. L. (2d Ed.) 1057, 1058; *Haynes v. Southern B. & L. Association*, 26 South. Rep. 527. That there two relations are entirely distinct and that the stockholder, who is a borrower, has no right to offset stock payments against his debt when the association is insolvent, is held not only in the Cairns and Shain cases, but in many others. *Hale v. Cairns*, 8 N. D. 145; *United States S. & L. v. Shain*, 8 N. D. 136; *Wolford v. Citizens' B. & L. Ass'n.*, 40 N. E. Rep. 694; *Eversmann v. Schmidt*, 41 N. E. Rep. 139; *Curtiss v. Granite State Prov. Ass'n.*, 36 Atl. Rep. 1023; *Goodrich v. Ass'n.*, 54 Ga. 98; *Strohen v. Franklin*, 8 Atl. Rep. 843; *Rogers v. Hargo*, 20 S. W. Rep. 430; *Sullivan v. Stucky*, 86 Fed. Rep. 491; *Brown v. Archer*, 62 Mo. App. 277; *Weir v. Granite State Prov. Ass'n.*, 38 Atl. Rep. 643; *American v. Gray*, 38 Atl. Rep. 668; *Price v. Kendall*, 36 S. W. Rep. 810; *Post v. Mechanics' B. & L. Ass'n.*, 69 N. W. Rep. 889; *Rogers v. Raines*, 38 S. W. Rep. 483; *Williams v. Maxwell*, 31 S. E. Rep. 820; *Thompson v. Ass'n.*, 27 S. E. Rep. 118; *Leahy v. Nat. B. & L. Ass'n.*, 76 N. W. Rep. 425; *Leary v. Ass'n.*, 49 S. W. Rep. 632. Inasmuch as the directors and officers of the association are chosen

by the stockholders and are their agents, the stockholders are all equally responsible for the insolvency of the association and can base no claim to favorable consideration on that account. *Sullivan v. Spanial*, 78 Ill. App. 125. Chapter 33, Laws 1899, is unconstitutional. *Maynard v. Granite State Ass'n.*, 92 Fed. Rep. 435; *Blake v. McLung*, 19 Sup. Ct. Rep. 165. A stockholder who has given notice of withdrawal cannot after the insolvency of the association receive any more than his just share. *Ricken v. Suddard*, 80 Ill. App. 204. The title to the bond and mortgage have vested in the plaintiff by a written assignment in due form, and whether he can maintain this action in his individual or his representative capacity is a matter that does not in the least concern the defendants who have no other interest in the question than that they may be protected as against a second payment of the debt to others. *Seybold v. Bank*, 5 N. D. 460-467. The directors in deciding to embark in business in Wisconsin, and in accepting the conditions of the Wisconsin statutes on which conditions alone such association could do business therein, fully represented all the shareholders of the association, and they are as much bound by the acts of the board of directors, their agents, as though they themselves had participated therein. *Lewis v. Amer. S. & L. Ass'n.*, 73 N. W. Rep. 793; *Burrows v. Bashford*, 22 Wis. 104.

BARTHOLOMEW, C. J. This action involves a foreclosure of a mortgage given to a building and loan association. It is the same association that was before us in the case of *Hale v. Cairns*, 8 N. D. 145, 77 N. W. Rep. 1010. The association is insolvent. Hale was the receiver appointed in Minnesota, which was the home of the corporation. The plaintiff in this case, Clarke, is the receiver appointed in Wisconsin; and he seeks to recover in this case upon an asset that was deposited by the association with the proper officers in Wisconsin under the laws of that state, which required a deposit as a condition upon which the corporation would be permitted to do business in that state. An interesting question is raised as to the power of the corporation, under its organic act, to thus deposit the assets, but we need not discuss the question at this time. Plaintiff seeks to recover in this action the amount borrowed by or advanced to the defendant, with certain interest thereon. The defendant insists that such is not the proper basis of recovery in this case; that, if liable at all, he was liable in the amount stipulated in his bond as liquidated damages for the breach thereof; and that by the express terms of his bond he is entitled to credit upon such amount for the sums that he has paid as monthly dues upon his stock. This contention was rejected by the trial court, and judgment and decree were rendered in accordance with the prayer of the complaint, and defendant appeals.

All the facts were stipulated. The case involves only questions of law. The trial court undoubtedly followed *Loan Co. v. Shain*, 8 N. D. 136, 77 N. W. Rep. 1006, and *Hale v. Cairns*, supra. In

the Shain Case this court held that where the owner of 30 shares of stock, of the face value of \$3,000, borrowed \$1,500 from the association, paying as bonus therefor 15 shares of said stock, and giving his note for the amount actually received, and securing the same by mortgage, and by transferring the remaining 15 shares as collateral, with an agreement upon his part to continue the payment of monthly dues upon all the stock until it was matured, with the privilege of then paying his loan by transferring the remaining stock absolutely, such party was not entitled, when an action to foreclose by reason of his default was brought by the association, to have his monthly dues paid credited upon his indebtedness. This case was immediately followed by the Cairns Case. There the association was insolvent. The only differences noted in the opinion between the contract in that case and in the Shain Case was the fact that in the Cairns Case the note or bond was given for the amount of money borrowed or advanced, and also for the amount of the premium bid, and all the stock was transferred as collateral in addition to the mortgage security. We held in that case that nothing could be recovered on account of the bonus or premium; that the consideration therefor was the expectation that the stock would be matured, and large profits thereon in the way of dividends would inure to the stockholders, and as the association, by reason of insolvency, was unable to mature its stock, such consideration had failed. Hence nothing could be recovered by way of premium, and, if anything had been paid thereon, the defendant was entitled to credit for the same. But, limiting the recovery to the amount borrowed, with interest, we held that defendant was not entitled to credit for the amounts paid as monthly dues upon stock; that the borrowing of the money and the purchase of the stock were separate transactions; that each must stand by itself, and that to allow defendant credit for monthly dues paid would give borrowing stockholders a great advantage over nonborrowing stockholders, and eventually throw all the loss upon the nonborrowing stockholders, and thus destroy the principle of mutuality, which is the basis of all such associations. Counsel for appellant in this case do not question the reasoning of these cases, or the authorities upon which they are based, or the conclusion reached from the premises assumed; but counsel do contend that this court did not properly construe the contract in the Cairns Case, the same being identical with the contract here involved. There are provisions in this bond and mortgage that were not specially noticed in the Cairns Case. The bond is for \$1,600, but the exact conditions are so material in the case that we copy them in full: "The condition of the obligation is such that whereas, said Ingebor Olson has bid, in accordance with the by-laws of said association, the sum of eight hundred dollars as and for a premium for the advancement to her by said association of eight hundred dollars, by way of anticipation of the value at their maturity of sixteen shares of the capital stock of said association now owned by said Ingebor Olson; and whereas, said association

has this day advanced to said Ingebor Olson the sum of eight hundred dollars, in consideration of said premium, and by way of anticipation: Now, therefore, if the said bounden Ingebor Olson and Mathias Olson, their heirs, executors, and administrators, or any of them, shall well and truly pay or cause to be paid unto the said association, its certain attorney, successors, or assigns, at its said home office, on or before nine years from date hereof, the just sum of sixteen hundred dollars as aforesaid, together with interest on eight hundred dollars at the rate of six per cent. per annum from the nineteenth day of March, A. D. 1889, until paid, in money, payable monthly, or shall well and truly pay or cause to be paid unto said association, its certain attorney, successors, or assigns, at its home office, the sum of nine and 60-100 dollars, on the twenty-fourth day of each and every month hereafter, as and for the monthly dues on said sixteen shares of the capital stock of said association now owned by the said Ingebor Olson, and by her hereby sold, assigned, transferred, and set over to said association as security for the faithful performance of this bond, and shall also well and truly pay or cause to be paid all installments of interest aforesaid, and all fines which become due on the said stock, without any fraud or further delay, until said stock becomes fully paid in and of the value of one hundred dollars per share, and shall then surrender said stock to said association, then and in either of such cases the above obligation to be void, otherwise of full force and virtue: provided, however, and it is hereby expressly agreed, that if at any time default shall be made in the payment of said interest or the said monthly dues on said stock for the space of six months after the same, or any part thereof, shall have become due, or if the taxes and assessments on the property mortgaged to secure the faithful performance of this bond be not paid when due, or if the insurance policy or policies on the said mortgaged property be allowed to expire without renewal, then and in either or any such case the whole principal sum aforesaid shall, at the election of said association, its successors or assigns, immediately thereupon become due and payable, and the sum of ten hundred thirty-six and 80-100 dollars, less whatever sum has been paid said association, as and for the monthly dues on said sixteen shares of said capital stock, at the time of said default, may be enforced and recovered at once, as liquidated damages, together with and in addition to all interest and fines then due, and all costs and disbursements, including said taxes, insurance, and assessments, which have been paid by said association, anything hereinbefore contained to the contrary notwithstanding." There was a mortgage given to secure the payment of the money in accordance with the terms of the bond. All the facts were stipulated, and in addition to what appears from the bond, and the corporate capacity of the building and loan association, its insolvency, and the appointment of the plaintiff as receiver in Wisconsin, and his possession of the bond and mortgage as such receiver, it is stipulated that plaintiff had paid all monthly dues upon said stock from the time of the subscription

therefor to the time of insolvency, such payments amounting to the sum of \$1,068, and had also paid all interest accruing upon said sum of \$800, the amount of interest paid being \$327.33

Perhaps we can the sooner ascertain the real meaning of this bond if we first consider what would have been the rights of the association under the bond had it continued solvent. It will be noticed that the limit of time for payment was nine years. It might be paid sooner, but could not run longer. There is also an absolute provision that the bond may be paid by maturing the stock and surrendering the same in payment. Should the stock reach maturity in five years, it could then be surrendered, and the bond taken up. But, as the limit was nine years, it is perfectly clear that it was the expectation of both parties that under no circumstances would it require more than nine years to mature the stock. Any shortening of that time would to that extent lighten the burdens of the stockholder. It will be noticed, also, that the amount fixed as stipulated damages is \$1,036.80. This sum represents exactly the monthly dues of \$9.60 on said 16 shares for nine years. In no event, then, could a defaulting borrowing stockholder avoid the payment of the full amount that it was estimated might be necessary under the most unfavorable circumstances to mature his stock. Now, if we assume that the association continued solvent, and that the defendant stopped the payment of monthly dues when he did, and refused to make further payments for the space of six months, what would have been the rights of the association? Learned counsel insist that the association would have had an option. They say that the bond unequivocally binds the defendant to pay the full sum of \$1,600, either in cash, or by maturing his stock and surrendering it. Having defaulted in his payments, counsel say the association might claim the full \$1,600 in cash, and enforce payment by sale of the mortgaged property; and, of course, on counsel's theory, there could be no deduction for stock dues paid. Or, say counsel, the association might elect to foreclose for the stipulated damages, less stock dues paid. In this case the payments exceeded the damages, and necessarily, upon this basis, the association would take nothing. The contention therefore reduces itself to this: The association had its option to take \$1,600 or to take nothing. We deem no argument necessary to refute that position. The fact is, the option, so far as one existed, was entirely with the defendant. He might pay in cash the full face of the bond, or he might continue his payment of dues until he had paid 100 cents on the dollar on his stock, and then surrender his stock and demand his bond, or he might make his payment of dues until he had paid the sum of \$1,036.80, and, the other conditions being complied with, he might safely stop. The proviso in this bond (and neither counsel nor court have found its exact equivalent elsewhere) modifies and changes, and to some extent defeats, all that precedes it. It declares: "And the sum of ten

hundred thirty-six and 80-100 dollars, less whatever sum has been paid said association as and for the monthly dues on said sixteen shares of said capital stock at the time of said default, may be enforced and recovered at once, as liquidated damages." Counsel cite the use of the word "may" as indicating an option in the association. The word "must" would have forced the association to sue, whether it so desired or not. The parties had no such purpose. But, if it did sue, the recovery was limited to the amount there stated,—in the language of the proviso, "anything hereinbefore stated to the contrary notwithstanding." Now, if we assume further, under the conditions already assumed, that the association brought an action against the defendant on the bond and mortgage, and that the defendant set up the payment as here stipulated, what judgment could the court render against the defendant? For the full \$1,600? Clearly not. For the advancement of \$800? Clearly not. For the \$1,036.80, as the liquidated damages? Clearly not. It could only render judgment for the balance remaining after deducting payments from the stipulated damages. As in this supposed case the balance would be on the wrong side, no judgment whatever could be rendered against the defendant. To our minds, it is clear and certain that the association must have failed in any action it might have brought against this defendant. Taking that as true, another result is inevitable; and that is that this bond and mortgage were never given to secure the sum of \$1,600 or \$800 advanced, but to secure the payment of the stock dues for the period of nine years, and no longer. We must not be understood as holding that if the defendant had not fully paid for his stock, either in money or by profits properly credited, he cannot be required to make further payments. When he subscribed for the stock he became bound, upon elementary principles,—at least, so far as the creditors of the corporation are concerned, and irrespective of any question of loan or advancement,—to pay for his stock in full. That obligation still remains in full force, just as it does on the part of all nonborrowing stockholders, but, beyond the time limit already indicated, that obligation is not secured by the bond and mortgage. Neither do we hold that the association bound itself in any way to receive or treat the stock as mature at the end of nine years. Such a contract on its part might be *ultra vires*. See *King v. Investment Union* (Ill. Sup.) 48 N. E. Rep. 667; *Weirman v. Investment Union*, 67 Ill. App. 550. But there is no such contract involved in this transaction. Another suggestion intrudes itself here. Let it be granted for the moment that defendant, by his bond, agreed absolutely to mature his stock; what evidence have we in this case that his stock was not mature when he ceased payments? Counsel say that the fact that the association is insolvent proves that it was not. But is that true, in the sense in which the words are used in the bond? When the defendant undertook to mature his stock, did he assume liability for the defaults and delinquencies of all the other holders of stock in his series, and obligate himself to continue payments until all the

stock of the association was matured? This will hardly be claimed. What evidence have we, then, that defendant's stock was not mature? He had continued his payments beyond the furthest limit that was estimated to be required to mature the stock. He had paid in dues and interest about \$1,400. Certainly, if we take this investment as an average sample of the business of the corporation, the stock had been mature for several years. Were the association plaintiff herein, it would fail, as the evidence stands, even upon the theory that defendant was bound by the terms of the bond and mortgage to mature his stock. But, as already stated, no such obligation rested upon him under the terms of his bond.

We have in this case, then, the receiver of a corporation suing upon a contract under which it is certain the corporation would have no right of action against the defendant. It will be conceded that ordinarily a receiver would have no greater rights than the corporation. If a party borrow \$1,000 from a bank, and give his note for the amount, due in one year, and secured by a mortgage, and if the following day the bank go into the hands of a receiver, such officer has no other or greater rights as against the borrower, than the bank had. Any defense that could have been urged as against the bank can be urged as against the receiver, and, whether there be any defense or not, the receiver cannot sue upon the note until the expiration of the year. The plea that it is necessary to realize at once upon the assets of the bank will not avail. The borrower may stand upon the letter of his contract. These principles are elementary. See High. Rec. §§ 201, 204, 205, 247, 315. It is also the universal holding in this country that the capital stock of a corporation is a trust fund for the benefit of creditors, to which they may look, and upon which they may rely for the payment of their claims, and their rights thereto are superior to any rights of stockholders therein. Creditors may always assume that stock subscriptions have been paid in full or are subject to call. *Thomp. Stockh.* § 11; *Cook, Stock, Stockh. & Corp. Law*, § 42. From this doctrine it follows that were the note to the bank already mentioned given as the purchase price of stock in the bank, for which the party subscribed, and the bank was subsequently placed in the hands of a receiver, such receiver might at once proceed to collect the unpaid money on the stock subscription. But in so doing he repudiates the express contract for payment, and relies upon the contract which the law raises by reason of the subscription. *Id.* §§ 71, 108. For the enforcement of that contract he must look to the subscriber's general responsibility, and cannot rely upon the mortgage lien, because that is a part of the contract which is repudiated. Of course, the receiver might await the maturity of the note and enforce the express contract, but he need not do so. In this instance it may be that the receiver would have a right of action that was not open to the corporation, as it has been held that a sale of stock, to be paid for within a reasonable time, was valid between the corporation and the purchaser. *Mitchell v. Beckman*, 64 Cal. 117. But this ex-

ception arises from the fact that, in favor of creditors, the law conclusively presumes that all stock subscriptions have been paid for in full, or are subject to call. The general rule is that a corporation may contract with its stockholders in the same manner and to the same extent as with other persons, and a stockholder who is indebted to the corporation occupies a dual relation,—one as debtor, the other as stockholder,—and these relations are entirely independent of each other. *Ely v. Sprague*, 1 Clarke, Ch. 351. And in enforcing collection against a stockholder the corporation has no other or greater right than it has in enforcing the collection of an indebtedness of any other person, except that it may be that a statute or the charter or by-laws give the corporation a lien on the stock for the indebtedness of a stockholder. It may be of benefit to keep these general principles in view in the further investigation of this particular case.

Counsel in this case insist that the equitable principles so often applied by courts in actions brought by receivers of insolvent building and loan associations to collect amounts loaned or advanced to its members must be applied here, and that this defendant must be required to repay the amount advanced with interest thereon, and can claim no credit for stock dues paid. We need not question plaintiff's right to recover back money advanced by the association to the defendant. We are not concerned upon that point. We are only concerned in determining whether or not this mortgage in the hands of this receiver can be held to secure such payment. This mortgage forms a part of the contract between the association and the defendant. As already stated, the mortgage was not given to secure the face amount of the bond, or to secure the amount advanced, but was given to secure what the association could recover under the bond in case defendant made default, and that was the monthly stock dues and interest payments for the space of nine years. The Supreme Court of Wisconsin, in *Leahy v. Association*, 100 Wis. 555, 76 N. W. Rep. 625, said: "Thus it seems that, as the corporation is defunct, membership ceases, and all contracts must therefore, of necessity, be set aside. It is upon the theory of the rescission and abrogation of the contracts that equity steps in and winds up its affairs, and makes a ratable distribution of assets." And in *Knutson v. Association*, 67 Minn. 201, 69 N. W. Rep. 889, it was said: "Then in winding up such a corporation, we can see no principle on which to proceed in adjusting matters between it and its members, except the principle of rescission, so far as the same can be equitably and justly applied." Yet we do not understand that these cases, or any other, treat the insolvency of the association as working an absolute rescission and extinguishment of the contract. But they do hold, and for reasons that have often been stated, that such insolvency necessarily works a modification of the contract. The modification usually introduced is to the effect that whatever is secured by the mortgage becomes presently due upon insolvency of the association. In those states where it is held that the contract of subscription and the contract of advancement or loan are indissolubly connected, and

that the real purpose of the security is to secure the payment of stock dues until such dues equal the amount of the advancement or mature the stock, and when in all cases of foreclosure it is held that the mortgagor is entitled to credit for all dues paid, it may, upon the general principles already considered, logically be held that the monthly dues, representing, as they do, payments upon subscription to capital stock, are presently due upon insolvency, and the receiver, acting in the interests of creditors, may at once collect the unpaid subscription to capital stock. We cite as cases of this character *Association v. Zucker*, 48 Md. 448; *Association v. Buck*, 64 Md. 338, 1 Atl. Rep. 561; *Buist v. Bryan* (S. C.) 21 S. E. Rep. 537, 29 L. R. A. 127. But in those jurisdictions where it is held that the subscription contract and the loan or advancement contract are entirely distinct and separate, and that the mortgage is given to secure the loan or advancement, and that the mortgagor, in case of foreclosure, is entitled to no credits for payments upon stock subscription, and that, as said in *Post v. Association* (Tenn. Sup.) 37 S. W. Rep. 217, 34 L. R. A. 201, "the relation of borrower and stockholder are separate and distinct," it may be somewhat difficult to find a logical basis for holding that the debt which the party owes as a borrower, and the maturity of which, by the terms of his borrowing contract, is yet in the future, is made presently due by the insolvency. Ordinarily a man's property can be sold under a contract lien only in conformity to the letter of his contract. Many of these associations are authorized to loan funds to parties not stockholders. We do not think it would be contended for a moment that this rule could be applied to such borrowers. And if it be the law that a corporation may contract with its stockholders and in enforcing all such contracts, with the single exception of the stock subscription contract, such stockholder has the same rights as other contracting parties, it becomes still more difficult to appreciate the force of the principle that declares these mortgages presently due. We cite, as among the leading cases on this point, *Rogers v. Hargo*, 92 Tenn. 35, 20 S. W. Rep. 430; *Strohen v. Ass'n.*, 115 Pa. St. 273, 8 Atl. Rep. 843; *Weir v. Ass'n.* (N. J. Ch.) 38 Atl. Rep. 643; *Curtiss v. Association*, 69 Conn. 6, 36 Atl. 1023. This point was not presented or decided in the Cairns Case, nor is it involved here, because, if there existed any liability whatever upon the bond and mortgage in suit, it was mature, by the terms of the bond, when the action was brought. But the cases cited will show that, while insolvency has been permitted to hasten the maturity of a claim, it has never been allowed to change the purpose of the security. Courts which hold that the mortgage secures monthly dues, when the action is brought by a solvent corporation, hold the same when the action is brought by a receiver, and courts that hold that the mortgage was given to secure the loan or advancement adhere to such holding when the action is by a receiver; and, indeed, courts which hold the two contracts distinct and separate, and sometimes allow a credit on the mortgage indebtedness of the withdrawal value of the stock as

against solvent associations, refuse such credits when the action is by a receiver. We have found no case where it was held that the mortgage might secure the loan, and also the monthly dues, as distinct obligations. Courts expressly refuse so to do. See the Shain Case, *supra*, and *Fagan v. Association* (Minn.) 57 N. W. Rep. 142. Neither, we confidently assert, can any case be found where a receiver of one of these insolvent associations has ever been permitted to recover, upon the contract, a larger sum than the association might ultimately have recovered had it remained solvent. It follows, then, that, since this mortgage was given to secure the payment of the monthly dues for nine years; it was not, and could not be, by the fact of insolvency of the mortgagee, transmuted into security for a separate indebtedness in the sum of \$800; and, what it did secure having been paid in full before the action was brought, plaintiff must fail.

But learned counsel earnestly contend that the proviso in this bond containing the liquidated damages clause cannot avail as against this plaintiff, because it declares that "if at any time default shall be made," etc. It is said that this proviso becomes operative only upon default, and it is conceded that defendant was not in default, hence the liquidated damage clause does not apply. Of course, when the bond was drawn it was supposed that no right of action could accrue thereunder without defendant's default. The language used was intended to cover any condition that enabled an action to be brought upon the bond. We are cited to no case which has held that such clause would not apply whenever a cause of action accrued against defendant. Any other construction would be narrow, and would lead to most inequitable, not to say absurd, results. Suppose that, on the day that defendant received his advancement and executed his mortgage another stockholder had received the same advancement and executed similar papers. Suppose such other party had continued his payments for eight years and six months, and then ceased. Defendant continued his payments for six months longer, or until the expiration of the nine years. Immediately thereafter a receiver is appointed. When he sues such other party to recover the money advanced to him, such party might, on counsel's theory, compel him to sue for the liquidated damages, because such party was in default for six months, and he would then be entitled to credit for monthly dues paid for eight years and six months. When the receiver sues this defendant no such claim can be made, counsel says, because there is no default. Hence defendant must pay his full advancement, and get no credit for monthly dues paid for nine years. In other words, the contract places an immense premium upon the default. We cannot so construe it.

But it is further insisted that this contract, under the construction which we give it, defeats the basal principle of mutuality upon which building and loan associations are founded. We fully recognized that principle in the Cairns Case, and we do not depart from it in the least. That principle requires us to assume that all contracts

of such an association with its members are intended to preserve such mutuality, and, if it were clear that any such contract necessarily violated or destroyed that principle, it might be the duty of a court, following such presumption of intention, to disregard even the express terms of the contract. But we are confronted with no such necessity. While we presume that this contract was intended to preserve the principle of mutuality, there certainly is nothing in the case to indicate the contrary, and nothing to show that it has not in all respects answered the purpose. If we could indulge any presumption, it would be that this defendant had paid more than his proportion of all losses. He has paid beyond the utmost amount that was considered necessary to mature his stock. It is certain that, had all stockholders been equally prompt in the performance of their obligations, there never could have been any loss to the association, except upon the basis of gross incapacity or criminality on the part of its managing officers. Counsel use the argument so often used by courts,—that to permit a borrowing stockholder to deduct from the amount advanced to him his payments on stock subscription dues would eventually throw all losses upon the nonborrowing class. But that position ignores the fact that in this instance the payments are not deducted from the advancement, but from a much larger sum; *i. e.* the sum calculated to be sufficient in any event to mature the stock. That was the principle adopted by this association to preserve mutuality. As we have said, we find it in no other association. It may be all wrong in principle. The event may demonstrate that it does not preserve mutuality, but we certainly cannot say so from the data before us. But for another reason the principle of mutuality cannot be destroyed. We have already said that this bond and mortgage did not secure the payment of stock subscription dues until the stock was mature, but only for the limited term of nine years. If this defendant's stock be not in fact mature, his liability under his original subscription contract remains in full force, and this receiver has the same powers and rights in enforcing it that he would have in enforcing the liability of any nonborrowing stockholder upon his unpaid stock subscription. But he is not seeking here to enforce that liability. He is suing on the contract. The utmost that the association could ever have recovered upon that contract had been paid before the receiver was appointed. He can recover no more on the contract. We may not substitute for the contract which the parties did make a contract which we may think would have been better. The plaintiff must fail in the action. It is the judgment of this court that this action be dismissed, with costs of both courts to defendant. The District Court will set aside its judgment, and enter judgment accordingly. All concur.

SUPPLEMENTAL OPINION.

After the foregoing opinion had been handed down, our attention was called to the fact that a mistake had been made in the stipulation of facts upon which the case was presented, and that the full

amount of liquidated damages as stipulated in the bond had not and has not been paid. The mistake arose in this way: The original stock subscription was for 20 shares of stock. Only 16 of these shares were involved in the loan or advancement transaction. But stock dues were regularly paid upon the full 20 shares, and the payments so made amounted to the said sum of \$1,068. Upon the 16 shares only \$854.40 had been paid, leaving an admitted balance of \$182.40 in order to make the liquidated amount of \$1,036.80. But appellant insists that he owes this sum to the general receiver appointed in Minnesota, that such receiver has the legal title to the bond and mortgage, and that the plaintiff herein, as the receiver appointed by the courts of Wisconsin, has no title thereto, and can maintain no action thereon. This contention compels us to pass upon the question suggested in the original opinion, but which, on the record as it then stood, was not necessarily involved.

As stated in the original opinion, the bond and mortgage here in suit, with other securities, amounting in the aggregate to over \$100,000, were deposited by the American Savings & Loan Association with the treasurer of the State of Wisconsin, for the benefit of the members and creditors of such association in such state. Such deposit was a condition precedent, and upon which such foreign corporation was permitted to do business in said state. See Sanb. & B. Ann. St. Wis. § § 2014-2017. It is urged that such deposit was in legal effect an assignment of the bond and mortgage, and as such was utterly destructive of the contract between defendant and said association, as such contract contemplated and was based upon the proposition that such association should receive and reinvest all stock dues and interest, and the same should inure proportionately to the benefit of defendant, and hasten the maturity of his stock. The premise upon which this contention is based is unsound. The deposit did not take away the legal title of the association to the securities. The statute of Minnesota under which the association was created, and which is now section 2860, Gen. St. 1894, required such association to keep all mortgages or other securities received by it on deposit with the treasurer of that state, or a duly chartered trust company, approved by the public examiner of such state, but also provided that when the association desired to do business in another state, the laws of which required a deposit in that state, sufficient of such securities to enable the association to do business in such other state might be withdrawn from Minnesota and deposited in such other state. The effect of the deposit was the same in the two cases, and the purpose in each was to secure the faithful application of such securities, and the legal title was not effected. The statute of Wisconsin expressly provided that all stock dues and interest paid upon securities deposited should be received, retained, or reinvested by such association so long as it remained solvent. This in no manner destroyed the basis of the original contract. It is urged however,—and this is the point upon which appellant chiefly relies,—that the deposit of the securities by the directors of the association

in the state of Wisconsin, and for the purposes required by the laws of that state, was an act *ultra vires*, in that by such deposit the stockholders resident in Wisconsin were given a preference and superior right over other stockholders, and thus the principle of mutuality—the basis upon which such associations rest—was destroyed. This contention, in all its phases, was urged before the Supreme Court of Wisconsin in *Lewis v. Association*, 98 Wis. 203, 73 N. W. Rep. 793, 39 L. R. A. 559. That was the same association here involved. Lewis, a stockholder residing in Wisconsin, brought his action for the express purpose of having the securities that had been deposited with the state treasurer of Wisconsin applied first to the satisfaction of the creditors and members resident in Wisconsin. The association was already insolvent, and Mr. Hale had been appointed general receiver by the District Court of Hennepin county, Minn. He asked to be made a party defendant in that action, and, having been so admitted, he filed his answer, setting forth at great length all the matters here relied upon as a defense. A demurrer to the answer was sustained, and this holding was affirmed. The Supreme Court of Wisconsin, in deciding the case, first call attention to the well-settled principle that a corporation chartered in one state is a foreign corporation as to all other states, and has no natural or inherent right or authority to transact business in such other states, but may be excluded therefrom, and if admitted, by comity between the states, to do business in any other state, it must be upon such terms and conditions as such state may impose. From that principle it necessarily follows that the State of Wisconsin had a clear right to require the deposit of securities as a condition precedent to the transaction of business by the association in that state. That court further held (and we think it clearly correct) that the statute of Minnesota under which this association was organized contemplated and authorized the extension of the business of the association to other states, and recognized the fact that compliance with the laws of such other states would be necessary. Further, as one of the purposes of the association was the extension of its business into other states, the association had the power to make the deposit, as incident to the accomplishment of the purpose of its creation. From this it follows that the authority of the association, acting through its directors, to make the deposit, if not expressly granted by the statute which stands as the charter of the association, was at least impliedly granted. Counsel in this case concede that the stockholders in a corporation are conclusively bound by the action of its board of directors, acting within the scope of its express or implied authority, but they insist that there can be no authority in the board of directors of a building and loan association to depart from the principle of mutuality upon which such associations are based. However broad that principle may be, whenever an association is authorized to transact business in different states, and compliance with the varying laws of such states renders strict mutuality impossible, it must necessarily be held that, by the mutual consent of

all stockholders, the principle has been waived or abandoned to the extent required by such varying statutes. In the case of *Lewis v. Association*, supra, the court also based its holding upon the ground of estoppel, and said: "It is well settled that a corporation cannot avail itself of the defense of *ultra vires* when the contract in question has been in good faith fully performed by the other party, and the corporation has the full benefit of the performance of the contract. Much less will the claim that the transaction was *ultra vires* be allowed as a ground for rescinding the contract, and restoring to the complaining party, on that ground, the property or funds with which he has parted, after he has had the benefit of full performance of the contract by the other party; and, in general, the plea of *ultra vires* will not be allowed to prevail, whether interposed for or against a corporation, when it will not advance justice, but, on the contrary, will accomplish a legal wrong. *Kadish v. Association*, 151 Ill. 531, 38 N. E. Rep. 236; *Arms Co. v. Barlow*, 63 N. Y. 62; *Bank v. Mathews*, 98 U. S. 628, 629, 25 L. Ed. 188. 'Where it is a simple question of capacity or authority to contract, arising either on a question of regularity of organization or of power conferred by the charter, a party who has had the benefit of the agreement cannot be permitted, in an action founded on it, to question its validity. It would be in the highest degree inequitable and unjust to permit the defendant to repudiate a contract, the fruits of which he retains.' Sedg. St. & Const. Law, 73. In 2 Beach, Priv. Corp. § 425, the subject is fully considered, and numerous modern authorities are cited, showing that 'where a contract has been in good faith fully performed, either by the corporation or the other party, the one who has received the benefit of it will not be permitted to resist its enforcement by the plea of a mere want of power.' *Darst v. Gale*, 83 Ill. 136; *Carson City Sav. Bank v. Carson City Elevator Co.*, 90 Mich. 550, 51 N. W. Rep. 641; *Holmes & Griggs Mfg. Co. v. Holmes & Wessell Metal Co.*, 127 N. Y. 260, 27 N. E. Rep. 831; *Raft Co. v. Roach*, 97 N. Y. 378; *Bradley v. Ballard*, 55 Ill. 415; *State Board of Agriculture v. Citizens' St. Ry. Co.*, 47 Ind. 407; *Oil Creek & A. R. R. Co. v. Pennsylvania Transp. Co.*, 83 Pa. St. 160, 166." It would be surprising if the law were not as indicated by these authorities. In this case the association, by complying with the condition prescribed by statute, received a license to do business in Wisconsin. It did business in that state for years. It received all the benefits arising from such business. It cannot return those benefits, and every principle of equity forbids that it should now be permitted to repudiate the condition upon which they were received. It follows that the receiver appointed by the Wisconsin court is the proper party to enforce the securities that had been deposited in that state. The order for the judgment heretofore made in this case is set aside. The District Court is ordered to render judgment for plaintiff for the sum of \$182.40, with interest at 6 per cent. per annum from December 24, 1895, with the usual decree of foreclosure against the land described in the complaint. Plaintiff

will also recover the costs of the District Court, including an attorney's fee of \$25, and no more. The defendant will recover full costs and disbursements in this court. As thus modified, the judgment of the District Court is affirmed. All concur.

(83 N. W. Rep. 519.)

In re SIMPSON.

Opinion filed August 27, 1900.

Disbarment of Attorneys—Accusing Affidavits.

In disbarment proceedings, the contents of affidavits which have been filed as a basis for commencing such proceedings cannot be considered as evidence in support of the accusations upon the trial of the issues of fact. The accused has a right to be tried upon the evidence of witnesses who have been cross-examined or an opportunity given to do so.

Embezzlement.

An attorney who receives money for his client and without the knowledge, consent or authority of such client loans such money to a third person for his own benefit, is guilty of embezzlement under section 7464, Revised Codes, and such offense constitutes grounds for disbarment under subdivision 1 of section 433, Revised Codes.

Deceit.

Where an attorney settles an account upon which a suit is pending and receives payment on such settlement and thereafter conceals from his client the fact that the money has been paid and account settled, and continues his prosecution of the case at his client's expense, such act is a deceit practiced upon a party to an action and is an express ground for disbarment under section 428, Revised Codes.

Ground for Disbarment—Fraudulent Concealment of Facts.

Such acts are also violations of his duty as an attorney as laid down in subdivisions 2 and 6 of section 427, Revised Codes, and constitute grounds for disbarment under subdivision 3 of section 433, Revised Codes.

States Attorney—Willful Omission to Prosecute.

The duties of an attorney in this state, who is also state's attorney, as to the enforcement of the laws relating to the sale of intoxicating liquors are found in part in section 7604, Revised Codes, which requires state's attorneys to diligently prosecute any and all violations of such law and makes the neglect or failure to do so a misdemeanor punishable by both fine and imprisonment and forfeiture of office. Such misdemeanor involves moral turpitude and is also a statutory ground for disbarment under subdivision 1 of section 433, Revised Codes.

Defendant's License Revoked.

It is found under the evidence in this case that the accused in his capacity as an attorney at law committed the several offenses above referred to and his license to practice in the courts of this state is accordingly revoked and annulled.

Supreme Court Has Authority to Disbar.

The Supreme Court of this state, being clothed with the power to admit attorneys to practice has as an incidental and inherent power the right to suspend and disbar them from practice for unprofessional conduct, and section 432, Revised Codes, which purports to create such power in this court is merely a legislative affirmation of a power which already existed.

An original proceeding for the disbarment of Leslie A. Simpson, an attorney at law. The proofs were taken before a referee appointed by the court for the purpose. Upon the evidence reported, the accused was found guilty of conduct unbecoming an attorney and disbarred.

Newton & Smith, James G. Campbell and J. H. Field, for the accusers.

By Sec. 96 Const. only judicial powers can be imposed upon the Supreme Court or any of its judges. Both the admission and the removal of attorneys are judicial acts. *Ex parte Secombe*, 19 How. 9, 60 U. S. 565; *Ex parte Garland*, 4 Wall. 378, 71 U. S. 370; *Randall v. Brigham*, 7 Wall. 523, 19 L. Ed. 285-291; *Case of Henry W. Cooper*, 22 N. Y. 67. Jurisdiction is a power conferred on a court by constitution or statute to take cognizance of the subject matter of a litigation and the parties brought before it, and legally hear, try and determine the issues and render judgment according to the general rules of law upon the issues joined by them, either of law or of fact, or of both. *Brown on Jurisdiction*, 1. At common law all courts of general jurisdiction had power to suspend or disbar attorneys practicing before them. The authority still exists independent of statute. 6 Enc. Pl. & Pr. 710, note 5. In Professor Dwight's argument, 11 Abbott's Pr., 306-25, abbreviated in *Cooper's Case*, 22 N. Y. 69, it is contended that at common law the court had no power to appoint an attorney or counselor. See, also, opinion at page 90 where the court says, "Barristers or counselors at law in England were never appointed by the courts of Westminster, but were called to the bar by the inns of court, which were voluntary, unincorporated associations. The power to appoint attorneys as a class of public officers was conferred originally, and has been from time to time regulated and controlled in England by statute." In the United States the subject has been largely controlled by legislative enactment, although courts have sometimes questioned the power of the legislature in the premises. Opinion of Ryan, C. J., *In re Goodell*, 39 Wis. 232-239. In the absence of a law or custom conferring the privilege upon some other body or official, all courts possess the power inherently, of saying who shall practice as attorneys before them. The power to say who may practice as an attorney carries with it the power to say who may not. 3 Am. & Eng. Enc. L. (2d Ed.) 300, note 5; *Brooks v. Fleming*, 6 Bax. (Tenn.) 337. Authority to disbar is possessed exclusively by the tribunal authorized to grant licenses admitting to the profession. *People v. Green*, 7 Col. 244, 1 Am. & Eng. Enc. L. (1st Ed.) 944; *Cohan v. Wright*,

22 Cal. 293; *State v. Kirke*, 12 Fla. 278, 95 Am. Dec. 304. The constitution makes no express provision for the bar, but it establishes courts amongst which it distributes all the jurisdiction of all the courts. *In re Goodell*, 39 Wis. 239, *Putnam v. Sweet*, 2 Pinn. 302, Const. N. D. Sec. 85. An attorney is an officer of the court in which he practices, he is not in any sense a public officer of the state or of the United States. 3 Am. & Eng. Enc. L (2d Ed.) 282, notes 1 & 2. The constitution speaks of "the office of attorney at law." Sec. 37 Const. See also his oath, Sec. 423 Rev. Codes, Sec. 211 Const. An attorney's relation to the court is called "his office as an attorney." Sec. 1, Chap. 105, page 146, Laws 1899; *Case of Austin*, 5 Rawle, 191, 28 Am. Dec. 657-661. His office as an attorney invests him with certain enumerated duties and privileges. Sec. 427-429, Rev. Codes. The admission of an attorney to practice by the court is not the exercise of the power of appointment by the judges mentioned in Sec. 96, Const. *Cooper's Case*, 22 N. Y. 94. Sec. 86 of the constitution is composed of two parts, the last clause grants a general superintending control over all inferior courts under such regulations and limitations as may be prescribed by law. *State v. Johnson*, 79 N. W. Rep. 1081-1086; *State v. Archibald*, 5 N. D. 359, 66 N. W. Rep. 234. This grant of power is unlimited in extent, indefinite in character, unsupplied with means and instrumentalities. The legislature fixes the qualifications required for admission and also determines by what acts an attorney's privileges shall be forfeited. To the Supreme Court is delegated the execution of the legislative will. Here is a regulation and limitation for the exercise of superintending control over inferior courts. Sections 420 to 426, Rev. Codes. This legislation is justified by § 86, Constitution, wherein general superintending control is given to the Supreme Court over inferior courts. The licensing of persons to practice in the courts of the state, other than the Supreme Court, is a matter fit for the Supreme Court to control. Mandamus will issue to restore an attorney in an inferior court, for the office of an attorney is necessary to the administration of justice and is of public concern. *State v. Kirke*, 12 Fla. 275, 95 Am. Dec. 314. If, as contended, the constitution and statute vest the Supreme Court with plenary power and jurisdiction in the matter of the admission of attorneys, it follows that this court has power to disbar. In this state only statutory causes for disbarment will be considered upon motion to that end. *In re Eaton*, 5 N. D. 514. An attorney's license may be revoked for a felony committed by him, or for a misdemeanor involving moral turpitude. Subd. 1, § 433, Rev. Codes. Also for a willful violation of any of the duties of an attorney, or counselor, as prescribed by law. Subd. 3, § 433, Rev. Codes. An attorney who receives money or property of his client's, in the course of his professional business, and who refuses to pay or deliver the same to the person entitled thereto, within a reasonable time after demand, is guilty of a misdemeanor. § 438, Rev. Codes; § 7464, Rev. Codes; § 438, Subd. 3, § 420 and Subd. 6, § 427, Rev. Codes; *Stout v. Proctor*, 71 Me. 288; *Baker v. Commonwealth*, 10

Bush. (Ky.) 592; *In re Wall*, 13 Fed. Rep. 814; *In re Bowman*, 7 Mo. App. 569.

C. E. Gregory, (*Ball, Watson & Maclay*, of counsel), for accused.

The pending proceeding for the disbarment of the defendant is a special proceeding and involves the exercise by the court of original jurisdiction. If the court is clothed with the power in question, it must be derived either from some provision of the constitution or be attributable to some inherent power residing in a court without reference to constitutional or legislative enactment. Our courts are not clothed with the power and jurisdiction possessed by the courts of England at common law. All their powers, excepting such as are inherent in all courts, are derived from and are wholly dependent on the grant contained in §§ 86 and 87 of the state constitution. *People v. Circuit Court*, 48 N. E. Rep. 717; *People v. Attorney General*, 1 Cal. 85. These two sections provide that the court shall have appellate jurisdiction only, except in certain enumerated cases, and the matter of disbarment of attorneys does not fall within the list of excepted cases. There is nothing in the foundation of the Supreme Court which makes it the censor of the morals of the bar, or the guardian of the safety and dignity of the courts. In view of the grant to this court of appellate jurisdiction only, and of the fact that the offenses set forth in this case as the grounds of disbarment were not offenses committed in the presence of this court; that they concern not at all (unless in the most remote way) its dignity or self respect; do not involve its records or process, and in no manner hinders or obstructs its administration of justice, can it be said that the court has or ought to take jurisdiction. It was the intention of the legislature to preserve the right of appeal in cases of disbarment. § 437, Rev. Codes. It is expressly provided that a judgment of acquittal by the District Court shall be final. A strong implication arises from this provision that it was the intention of the legislature that disbarment proceedings should be initiated and tried in the District Court, excepting only as above stated, where it was necessary for the Supreme Court to exercise the jurisdiction as one of its inherent powers for its own protection. The following cases illustrate how sharply the line between original and appellate jurisdiction is drawn by the courts. *State v. Nelson County*, 1 N. D. 88; *Everett v. Board*, 1 S. D. 365; *In re Carothers*, 52 N. E. Rep. 742; *Ingraham v. Ingraham*, 49 N. E. Rep. 320; *Massey v. Powell*, 43 S. W. Rep. 506.

YOUNG, J. This is a disbarment proceeding prosecuted in this court against Leslie A. Simpson to revoke his license as an attorney and counselor-at-law for certain unprofessional acts alleged to have been committed by him in his capacity as an attorney. The proceedings were instituted under section 432, Revised Codes, which authorizes the Supreme Court or any District Court to revoke or suspend the license of an attorney and counselor-at-law to practice in the courts of this state.

The history of the case is as follows: On August 16, 1899, one William Thaw Denniston, an attorney-at-law, located in Billings county, filed his affidavit in the office of the clerk of this court charging the accused with the commission of three several offenses which constitute willful violations of his duty as an attorney and counselor-at-law. This affidavit with certain exhibits was served upon the accused under the direction of this court and he was given twenty days after the service thereof in which to file his answer. On October 3, 1899, James G. Campbell and J. H. Field, attorneys located at Dickinson, North Dakota, by leave of court, joined in the Denniston charges, and also filed in addition, their joint affidavit in which they charged the accused with eight separate and additional delinquences. The accused filed a verified answer to all of such charges in which he denied each and every act charged in the accusing affidavits save as to one charge. As to this he set up certain facts by way of explanation. After issue of fact was joined, both the attorneys for the prosecution and the accused petitioned the court for the appointment of a referee to take testimony, and in accordance with such prayer, a referee was appointed, who took a portion of the testimony at Dickinson, North Dakota, where the accused and most of the witnesses reside, and reported the same to the court. A number of witnesses who were subpoenaed on behalf of the accusations refused to testify before the referee. Such refusals were reported to this court. Attachments were issued and after a hearing such witnesses were punished for their contempts. Their testimony was given in open court at the hearing of the contempt proceedings. The rest of the evidence, both on the part of the prosecution and the accused, is presented to us in the form of depositions, save that of the accused, who testified orally before the court at the final submission of the case. The record is exceedingly voluminous, embracing altogether the testimony of thirty-six witnesses, as well as considerable documentary evidence.

For the purpose of convenience in treatment we shall classify such of the charges as we shall consider in this opinion under two heads. The first relates to the conduct of the accused with reference to a certain collection which he received from a Montana client. It is charged in Denniston's affidavit that in the year 1895 the Holter Lumber Company of Great Falls, Montana, through its attorney, James Donovan, also of Great Falls, forwarded to the accused at Dickinson, North Dakota, an account for about \$600 against one Lewis Christensen, of Belfield, in Stark county, for collection. That said Simpson, in violation of his duty as an attorney, and without the knowledge or consent of his client, "proposed to said Lewis Christensen to satisfy said demand for the sum of \$250, to be paid by the said Lewis Christensen on account of said Holter Lumber Company, for and in consideration of said account and demand, and \$50 to be paid to himself, said Leslie A. Simpson and for his own personal use, and thereupon the said sums were paid by the

said Lewis Christensen, and by said Leslie A. Simpson received, and a receipt in full for said account and demand executed by the said Leslie A. Simpson and delivered to the said Lewis Christensen." In this connection the affidavit further charges that the accused, while holding the \$300 so received, as before stated, falsely and with intent to deceive his client, pretended and asserted to "his said client that said claim had not been paid or any part thereof, and that he had for the enforcement of said claim commenced an action in the District Court of said Stark county, and that said action had been referred to J. P. Folsom, Esq., J. P., of said county as referee, and that it was necessary to take depositions in proof of said claim, and that in pursuance of a notice to that end, given by the said Leslie A. Simpson as attorney for the said Holter Lumber Company, certain depositions were taken at Great Falls, Montana, in June, 1896, and returned to the said J. P. Folsom, Esq., and that thereafter on or about August 31, 1897, the said Leslie A. Simpson paid the said Holter Lumber Company through its attorney, James Donovan, Esq., the sum of \$100, and thereafter the further sum of \$125, and falsely and deceitfully pretended that he was unable to secure his fee from the said Lewis Christensen in addition to the said \$250 and retained from the said sum \$25 as his fee." The source of Denniston's information is in part twelve letters written by Simpson to his said client, which letters were attached to and made a part of his accusing affidavit.

The following affidavit of Christensen was also attached to the Denniston accusation: "State of North Dakota, County of Stark, ss. Lewis Cristensen personally appeared and being duly sworn on oath says that he is the identical Lewis Christensen against whom the Holter Lumber Company of Great Falls, Montana, some time in the year 1895, sent a claim or account to Leslie A. Simpson, Esq., an attorney-at-law located at Dickinson, North Dakota, and that the amount of said claim was, at said time, \$600 or over; that some time in the summer of 1895 said Simpson saw me and said that if I would pay \$250 on the account and \$50 to him he would give me a receipt in full. I thereupon gave him two checks on the First National Bank of Dickinson, North Dakota, one for \$250, and one for \$50, and he gave me a receipt in full. L. Christensen." Verified.

On September 9, 1899, the accused filed the following verified answer to the foregoing accusation: "Answering paragraph two of said complaint, alleges that he received in the year 1895 from the Holter Lumber Company a claim amounting to \$429 against one Lewis Christensen, with full written authority accompanying said claim, to settle it as his judgment dictated; alleges that pursuant to written instructions from said client suit thereon was commenced against said Lewis Christensen and process duly served by the sheriff of Stark county, North Dakota, and defendant duly appeared therein by attorney. Admits that he settled the claim for \$250 and charged a fee of \$25 for his services from his client, and alleges that the money so paid was forwarded to client and by it

accepted and acknowledged in writing as a satisfactory, full and complete settlement of the matter, well knowing the circumstances thereof; alleges further that at the time said claim was received as appears by the public records of Stark county, said Christensen was not worth in property the amount of said claim on execution, or any amount whatever above his debts and liabilities and property exempt on execution, and alleges that said settlement was in every way to the interest of his client, and to his client's satisfaction, then and now, and that in all things connected therewith he was faithful to his client's interests, which satisfaction has never been and is not now questioned by said client. Denies that he asked for or received from said Lewis Christensen as his fee, or any part thereof, in said case, the sum of \$50, or any sum whatever, save as above set forth. Alleges that by an order made by the judge of the District Court of Stark county, said case was referred to A. P. Folsom, Esq., a justice of the peace of said Stark county, all of which he will show by a certificate of the judge of the said court, the referee appointed, the attorney appearing for the said defendant and the sheriff of Stark county at said time. Alleges that he is unable to produce the original files in said action and charges on information and belief that the said William Thaw Denniston stole them from said defendant's office while he was in charge thereof, and during defendant's absence from the state. Except as herein admitted, explained or qualified, denies each and every allegation in said paragraph two contained."

The second branch of the accusations includes numerous alleged breaches of duty on the part of the accused in relation to his duties as state's attorney under the prohibition law of this state, and covers a period of time commencing with his assumption of the office of state's attorney in January, 1897, and extending up to the present time. It is not practicable to take up the separate charges in detail. They will, therefore, be treated together. First, as to the accusations under this head: It is alleged in the Denniston affidavit that in the year 1897 one Matthew Pisha was operating a saloon in Dickinson, Stark county, and that the said Pisha, upon the understanding that he should not be prosecuted for conducting such saloon, and under the direction of the accused as state's attorney for Stark county, paid to the county treasurer of Stark county the sum of \$200 for a license to sell "liquid drinks" for a period of five months, and that said Pisha sold intoxicating liquors to the personal knowledge of L. A. Simpson and was not prosecuted or molested; that thereafter the county officers of said county, except the accused, refused to issue further licenses and did not do so; that thereafter and on February 3, 1898, the accused, through one Frank Kihm, who was acting as his agent, demanded from the said Pisha the sum of \$150 and threatened if the same was not paid the accused would inform against him for running a saloon; that said Pisha paid the \$150 so demanded to the said Kihm and that thereafter and on May 5, 1898, in pursuance of like threats and for a like purpose

paid the said Kihm the further sum of \$50 for the sole use of said Simpson for protection against prosecution in his business of selling intoxicating liquors; that the said Simpson is from time to time collecting large sums of money, to-wit: the sum of \$25 per month from divers persons in Dickinson for the privilege of selling intoxicating liquor and under the threat that he would prosecute them unless such payments are made, and that said Kihm is employed in making such collections. Affiant named as some of the persons engaged in such unlawful business the following: E. J. Berry, O. B. Frankenberg, Michael McGinley, and John Leonberger. Attached to the Denniston affidavit, containing the foregoing accusations, was the affidavit of Matthew Pisha, which fully sustained the facts alleged as to him, and further alleged as follows: "That in the months of May and July, 1897, affiant (Pisha) paid money to the county treasurer of said county by direction of said L. A. Simpson and received licenses from the board of county commissioners to carry on his business; * * * that affiant is informed and believes that said L. A. Simpson received one-fourth of the sum so paid; that subsequently the said commissioners refused to issue licenses and thereafter all sums paid by affiant were paid by him to the said Kihm as agreed upon for the sole use of said L. A. Simpson."

It is alleged in the remaining charges under this head that subsequent to the refusal of the county commissioners to issue further licenses, and on or about December 29, 1897, the said L. A. Simpson made affidavits accusing Michael McGinley, Matthew Pisha, Charles Klinefelter, Sr., E. J. Berry, Frank Kihm, and Charles O'Neil with conducting places wherein intoxicating liquors were sold contrary to the laws of this state and that at the instance of said Simpson and pursuant to his request injunctions and search warrants were issued against the places operated by the persons just named, by the judge of the District Court of said county, and all of such places were closed thereunder; that thereafter and early in the year 1898 such places were reopened and the sale of intoxicating liquors continued the same as before. "That the said Michael McGinley, Matthew Pisha, Ed. Berry, Charles Klinefelter, Frank Kihm, and others and each of them, as complainants, are informed and believe, so reopened said places, and continued said business with the knowledge, consent and connivance of said Leslie A. Simpson; that the said Leslie A. Simpson thereafter failed and willfully neglected further to prosecute said cases, or any of them, against said respective defendants; and each, every and all of the papers, files and records therein, failed and willfully neglected to file or deposit in the office of the clerk of the District Court of Stark county, wherein the said actions were commenced, and then pending, and on the contrary thereof wrongfully placed the same beyond his control with the intent that they should become lost and destroyed, and that they so did, and that the said Leslie A. Simpson has heretofore failed and willfully neglected further to prosecute said actions or to enforce the bonds therein, by each of the defendants given; and that he

has so done with the intent to avoid the effects of the laws of the State of North Dakota upon the defendants and each of them, and that thereby in each of said cases, the said Leslie A. Simpson has committed a misdemeanor involving moral turpitude."

On October 13, 1899, the accused filed a verified answer denying each and every fact alleged in the foregoing charges save this: "He admits that injunctions were issued and alleges that the owners of the buildings involved in such injunctions, under the prohibition law of North Dakota, gave bond and released said buildings, thereby dismissing said injunctional proceedings as appears by the files in said proceedings."

The foregoing are the only charges which we shall consider. They are set out at some length, so that the issues of fact to be determined may be clearly understood. On account of the serious consequences which must follow a finding that the charges are true, we shall limit ourselves to the consideration of evidence that is either undisputed or does not admit of doubt.

Two questions are to be kept in view as expressing the object of this investigation: First, is the accused guilty of all or any of the acts with which he is charged? Second, if he is, are they of such a character as to clearly establish, under the circumstances of the case, that he is an unfit person to be held out by the court to the public as an attorney and counselor-at-law? It is never a pleasant task to any court to investigate and pass judgment upon the professional conduct of the members of the bar and this case is not an exception. The accused has been engaged in the practice of his profession at Dickinson, in Stark county, for more than ten years and has apparently enjoyed a lucrative practice in that and adjoining counties. He has held the office of state's attorney of his county since January 1, 1897, and has been honored with other public positions. He is a man of family and is only in the prime of life. The future should hold for him a large measure of usefulness in his profession. These considerations invoke the personal sympathy of the members of this court, but we cannot permit them to cause us to shrink from the performance of the duty cast upon us and which we owe to the public, of carefully investigating the charges presented and passing judgment upon the facts as they shall appear and according to their truth.

Before proceeding to a consideration of the evidence the preliminary question is presented whether the allegations of fact contained in the various affidavits, to which reference has been made, and also others which have not been referred to, constitute evidence to be considered by us upon the trial of the issues of fact. We are of the opinion that they do not. It is the right of the accused to have the issues determined upon the evidence of witnesses who have been subjected to cross-examination or an opportunity given to do so. The sole function of these affidavits is to furnish a basis for the commencement of the proceedings. The rule which seems most sound to us and which we shall follow is announced *In re*

Eldridge, 82 N. Y. 161. The court in discussing this question said: "On the application addressed in the first instance to the court as to the mode of arousing its attention and setting it in motion, affidavits, minutes of testimony, anything which furnishes needful information may be used as the basis upon which to found an order to show cause." Upon the return of that order the accused is heard. He may confess; he may explain; he may deny. If he confess the court may at once render its judgment. If he explain the court may deem the explanation sufficient or the reverse; but if he meets accusation with denial the issue thus raised is to be tried summarily by the court itself or by the referee, but nevertheless to be tried, and on that trial the accused is not to be buried under affidavits or swamped with hearsay, but is entitled to confront the witnesses or submit them to cross-examination and to invoke the protection of wise and settled rules of evidence. In adopting this conclusion we only secure to the members of the bar the common rights and ordinary privileges of the citizen."

Turning now to the matter of the collection against Christensen, we find the original itemized account in evidence as an exhibit. It is dated January 1, 1895, and shows a balance due from Christensen of \$605.07. This account was transmitted to Mr. Simpson for collection early in the month of January, 1895, by the James Donovan referred to in the accusations. All the correspondence in regard to this claim was between Donovan and Simpson. Donovan kept no copies of the letters he wrote to Simpson and the latter seems to have been unable to find and produce any of the numerous letters which Donovan wrote him. It is established that the accused compromised the account with Christensen on the date named in the accusation, to-wit: July 15, 1895, and by evidence which is beyond dispute. There is written across the face of the account the following: "Settled this 15th day of July, A. D. 1895, between Lewis Christensen and L. A. Simpson, attorney for Holter Lumber Company, in full. L. A. Simpson." The prosecution showed that the writing and the signature is that of Simpson and upon his cross-examination the latter admitted that it is his writing. The prosecution also produced two checks executed by Christensen on the date of the alleged settlement and established by the evidence of the cashier of the bank on which they were drawn that they were both paid on the day on which they are dated and charged to the deposit account which Christensen carried in such bank. Following are the checks referred to:

"Dickinson, North Dakota, July 15, 1895. First National Bank of Dickinson pay L. A. Simpson or order Two Hundred Fifty and 00-100 Dollars. L. Christensen." (Endorsed on back, L. A. Simpson).

"Dickinson, North Dakota, July 15, 1895. First National Bank of Dickinson pay Lewis Christensen or bearer Fifty and 00-100 Dollars. L. Christensen." (Endorsed on back, L. Christensen).

There is evidence in the record tending to show that the written

portions of both checks, aside from Christensen's signature, are in Simpson's handwriting. When the accused was upon the stand testifying in his own defense he admitted that he received the \$250 check but did not testify as to the \$50 check. Neither did he contradict the evidence that the body of both checks was in his handwriting. This is significant in view of the fact that both checks bear the same date and were cashed on the same day, and upon the very day the accused receipted the account. Thirteen letters written by Simpson, or under his direction, and addressed and mailed to James Donovan in reference to this collection were introduced by the prosecution. We deem them so decisive that we set them out in full. Omitting the address and business card they are as follows:

"Dickinson, N. D., Jan. 26, 1896. Dear Sir: Your letter of the 22nd to Mr. Simpson, who is absent attending court in Bismarck, is received; relating to the claim Holter Lum. Com. this claim was put in action last summer and is still pending. I would suppose it would come up at the next term of court,—1st Tuesday in April. I think that we want the name of a notary public in your city to take depositions before as it will probably be necessary unless the case is settled. No attachment was issued as his property was incumbered by mortgage which would have come in ahead and he was hardly likely to try and dispose of it, while mortgaged. You had better send Mr. Simpson the name of the notary public, unless you have already done so as he will want to take the depositions some time before court. Yours Truly, L. A. Simpson, per R. M. S."

"Dickinson, N. D., March 16, 1896. Dear Sir: Have received no reply to my inquiry of recent date relative to the name of some notary in your city before whom depositions can be taken. Please send me also name of book-keeper for the plaintiff, client. Our term of court has been continued until May 4th and will not convene at the regular (April 7,) time. The defendant is well mortgaged up but think it should be put in judgment. Yours Truly, L. A. Simpson."

"Dickinson, N. D., April 20, 1896. My Dear Sir: I have just returned this morning having been absent since a week ago Sunday (12th) and get your letter. I will get out my notices today and will fix a date some time between now and the 2nd of May and will write you the date and send papers. I cannot get my fee besides the \$250 if he accepts the offer as that is not included; but I can take care of the costs as they will not be large. I shall see him right away tomorrow or the next day. If settled we can stop the taking of depositions, but will be ready for them in any event. I did not get this letter off in time for the fast train but think it will reach you nearly as soon. The papers will indicate the issue so that there will be no trouble in taking the evidence. Yours Truly, L. A. Simpson."

"Dickinson, N. D., April 25, 1896. My Dear Sir: I have given the debtor in the lumber company case an extension of time until

the 10th of May in which to fix the matter up on the terms I agreed with him (to be cash at that time) and which I wrote to you. I have not therefore served the Not. to take Dep. as it will not now be necessary. There is no doubt but what he will meet the terms. I consider this a very good settlement under all the circumstances as a judgment would be very, very doubtful property by reason of his being so mortgaged and his exemptions allowed under our laws. If you can I wish you would find the address of his partner while in Gt. Falls and I can get you a note for collection against him. He is supposed to be in the vicinity of your city. Yours Truly, L. A. Simpson."

"Dickinson, N. D., May 14, 1896. My Dear Sir: Yours Recd. about the Amt. of my fee in the Christensen case. Should have answered before but have been constantly in court since the 4th. Think the term will close by Saturday. I have been unable to get to Christensen yet as I could not get away and he is absent from home so his son states on the range in a cattle round up. I shall see him as soon as court closes. About the fee. I want to make it satisfactory and to make it enough so as to allow you the usual part. What do you consider will be fair and satisfactory to the client? They should make it liberal as we are 'picking up' the amount for them as it could not be recovered in my opinion on Exec. unless we had to wait a long time. Will be glad of your idea of the amount. Yours truly, L. A. Simpson."

"Dickinson, N. D., May 27, '96. My Dear Sir: Re—Holter L. Co. v. Christensen. Will the 11th of June suit you for the deposition? If not write me what date—it cannot be more than a day or two before that, as there will be too little time. If no settlement between now and day of deposition we will go on with it and take judgment. Think perhaps presence of deposition may push a little the settlement, as I am satisfied he is in good faith in making the offer. Awaiting your early reply, I remain, Yours truly, L. A. Simpson."

"Dickinson, N. D., June 10, 1896. My Dear Sir: Enclosed herewith is Notice to take Dep. and my office copy of the complaint in Holter Lum. Co. matter. The notice is the original and should be attached to the deposition in sending same in. The complaint is my office copy and should be returned to me after the taking of the Dep. Please send the Dep. to A. P. Folsom, Esq., J. P., Referee, Dickinson, Stark County, No. Dakota. Yours truly, L. A. Simpson."

"Dickinson, N. D., June 30, 1896. My Dear Sir: The Depositions have arrived all right. I was up to look them over yesterday and so far as the testimony goes they are satisfactory and in my opinion establish the issue. If the certificate of the Notary is all right, and I have no doubt that it is, the Deps. are entirely satisfactory. I shall look it over today. We have to give 8 days notice of the hearing of the case and I shall go ahead with it at that time unless something is done. Yours Truly, L. A. Simpson."

"Dickinson, N. D., Jan. 14, 1897. My Dear Sir: In answer to

yours of recent date relative to the matter therein referred to will state that the matter is still pending with the Referee. The understanding is that the matter will be adjusted before the term of court on the basis agreed (Referee's fees to be paid) and that it will not be submitted to the court. Yours truly, L. A. Simpson."

"Dickinson, N. D., April 17, 1897. My Dear Sir: In Re H. L. C.—Christensen. Your letter received. This matter has been let to drag because of the futility of an execution and I told Deft's attorney and him as well what I would take in cash and the same has been being promised all the time. I shall take judgment (which I am in shape to do) not later than the first of May unless the cash is forthcoming. I will at once then issue execution. It will probably bring the cash promised in settlement in order to avoid trouble of levy and claiming of exemptions. I will write you not later than May 3, whether I have taken judgment or settled. Yours Truly, L. A. Simpson."

"Dickinson, N. D., June 15, 1897. My Dear Sir: I have an order for judgment and will have same entered at once and proceed by execution against debtor. I think it will bring him to time, and will report our progress within next two weeks. Resp. L. A. Simpson."

"Dickinson, N. D., August 31st, 1897. My Dear Sir: On my return from a three weeks' trip in the Yellowstone Park I found your letter and wired you the same day but was answered that you was out of town and would not return until last of month. I enclose you \$100 from Christensen. The reason I have not filed papers with clerk is because I wanted to save the \$5.50 clerk fees. I wrote you a long time since that I had settled the case for \$250 and on payment of the money I do not feel like going back on the agreement. I was on the ground and considered this a good settlement and exercised my best judgment as you authorized me to do when you sent claim and by subsequent letters. I will get costs (except my fee) which will be satisfactory to you and will insist on balance of money this week and remit to you. The original files are in the hands of the referee appointed and have not been filed in the clerk's office. Yours Resp'y, L. A. Simpson."

"Dickinson, N. D., Sep. 15, 1897. Dear Sir: In answer to your recent letter re Christensen will state as I wrote you a long time ago that I settled this claim for \$250.00 which was a good settlement as debtor was not worth anything above exemption. In this state exemption are homestead of value \$5,000 absolute exemption which includes more than the average man here has, and above all this \$1,500 in cash or property. It was and is of my judgment and of my knowledge that I would not make the claim by exemption and if you have been informed otherwise you are erroneously informed. I deduct \$25 for my fee and enclose check to balance. I had your permission to settle the matter as my judgment dictated and acted upon it and you must have overlooked correspondence as in two letters you refer to the \$250 when I wrote you that it was

agreed to settle for that sum but it was not then paid. My fee is very low as you must admit. I had long ago agreed with debtor to settle for that and could not back out after agreement and released him in full on condition of his payment which has been accepted by me. The costs are paid by debtor. Yours truly, L. A. Simpson."

We forbear commenting on these letters further than to say that they furnish conclusive proof of a most flagrant deception practiced by the accused upon his client concerning the very subject of his employment and kept up for more than two years. It is now known that Christensen settled the account with the accused on July 15, 1895, and that whatever the sum which was paid by Christensen it was paid on that date. The defendant admits that he received \$250. All of the above letters were written by Simpson after that date. But these letters do not tell the entire story. The accused filed his verified answer to the accusation now under consideration, alleging in reference to the Christensen suit "that by an order made by the judge of the District Court of Stark County, said case was referred to A. P. Folsom, Esq., a justice of the peace of said Stark county, all of which he will show by a certificate of the judge of said court, the referee appointed, the attorney appearing for said defendant and the sheriff of Stark county at said time." Had the foregoing promises been kept by the accused and such facts been shown they would only have established a higher degree of deception practiced by the accused upon his client. But the promises of his answer were not kept. A. P. Folsom, the alleged referee, was on the stand. He testifies that he never qualified or acted as referee; that he never saw an order appointing him referee; that he was not notified that he was appointed and has no knowledge that he ever was appointed. He does say, however, that some time in 1896 he received a large letter through the mail from Montana which he opened in the post-office, and noticed that it contained certain papers relative to a suit by a Montana Lumber Company against Mr. Christensen; that he met Simpson in the post-office while he had the letter in his hand and at the request of Simpson went at once to the latter's office and turned over to him all the papers he had just received and has not seen them since. The judge of the District Court was called as a witness for the accused and testified as to his legal ability and general reputation as an attorney. The accused was present at the examination but did not see fit to interrogate him as to the alleged order appointing Folsom as referee or the alleged order for judgment, or as to any facts relative to the Christensen case. This omission to supply the promised facts when the opportunity existed to do so, and the judge was on the stand as his witness, was not, we think, accidental. It is significant and strong negative evidence at least that the judge had no knowledge of such orders and that no such orders were in fact made, and the same may be said of the failure of the accused to procure the evidence of A. J. Brunelle, the alleged attorney for Christensen, or to explain why he had not done so. The records of the clerk of

the District Court of Stark county contain no records of such a case. No papers of any kind have found their way into the record before us. The deposition which the accused caused to be taken in 1896 and sent to Folsom appears to have been lost. The explanation for his delay in obeying instructions, contained in the letter of January 14th, 1897, that the case was still pending before the referee, and the further statement in his letter of August 31st, 1897, that the files were then in the hands of the referee are shown to be entirely untrue.

This was substantially the state of the evidence on the charge we are now considering when the accused took the stand in his own behalf just before the arguments were made. He testified by way of explanation of this transaction in this language: "It has been a long time since I received that collection and I do not know that I can recall all the facts in the case. My recollection is that I received the claim in January, 1895, while I was absent at Bismarck attending the session of the legislature. I think that perhaps I did not see Mr. Christensen until after the legislature adjourned. That is my best recollection. I wrote him, however, in reference to the claim and I cannot say whether I received any answer or not at this time. The collection came to me from a Mr. Donovan, a lawyer at Great Falls, Montana, with a letter accompanying the claim. I was advised to bring suit and attach the property of Mr. Christensen.* * * I knew him quite well at that time but made further investigation as to his condition. * * * I was authorized in that letter to adopt such measures as my judgment dictated for the settlement of the claim. It was not paid, and in April and May, I am not clear as to the date, in 1895, or perhaps earlier than that, I drew up papers and saw Mr. Christensen, and he told me that he had paid this claim to the book-keeper of the Great Falls Lumber Company in Montana. I told him if that was a fact to produce a receipt and I would take no further proceedings, and I wrote that statement to Mr. Donovan I think. * * * He never produced the receipt and I turned the papers over to the sheriff of Stark county for service. * * * He made a return of the papers, and subsequently Mr. A. J. Brunelle, an attorney in Dickinson at that time, appeared in the action for Mr. Christensen. No papers were filed. Mr. Christensen saw me several times and agreed to pay me, and some time in 1895, the exact date I do not remember, but in 1895, I agreed with Mr. Christensen to settle that claim for \$250. He gave me his check for it on the First National Bank of Dickinson. Now that very same day, if my memory is right, and I want to state to the court that I am not entirely free from wrong in that matter, I let Mr. Christensen have \$150 of that money; that very same day he told me he had imperative need for it and I let him have it; at least he paid me \$100. This check was given on the First National Bank of Dickinson and I presume I cashed it, although I am not clear on that point. It is possible that I gave the

check to Mr. Christensen and he gave me \$100. He was to pay it back in a few days. I let it go. He never did pay it and I kept the \$100 waiting for this money, \$150, and I subsequently sent the balance when he did pay it, to the attorney at Great Falls, Mr. Donovan."

We are embarrassed to some extent in our efforts to ascertain the true facts of this transaction by the absence of Christensen's evidence. The record shows that the prosecution made diligent and repeated efforts to procure it, but were thwarted in their efforts to do so. No effort has been made by the accused to procure Christensen's testimony, neither has he expressed a desire to do so. At the final submission of the case, however, the accused filed an ex parte affidavit purporting to have been signed and verified by Christensen on October 2, 1899, at Dickinson. This was offered for the purpose of contradicting his former affidavit attached to the accusation and before set out. We have examined this second affidavit with care, and while it is skillfully drawn, we do not find that it contradicts or is inconsistent with the original affidavit or the evidence offered by the prosecution. As has been stated, however, affidavits cannot be used as evidence upon the issues on trial and it is referred to only for the purpose of showing that the accused could have secured Christensen's testimony if he had desired to do so. Under these circumstances the presumption is that his testimony would have been unfavorable to the accused. But conceding the truth of everything contained in the explanation of the accused, it is an explanation which, in our judgment, does not remove to any degree his guilt as charged in the moving affidavit, save only as to the receipt of the extra \$50. He admits that he received \$250 on July 15, 1895. His letters show that he did not remit it until August and September, 1897, and the fact that he had collected it was studiously concealed during all of this time. Neither do the surrounding facts lend any corroboration to the statement that he lent \$150 of this money to Christensen. Everything is against it. First, Christensen does not seem to have had occasion to borrow. He had a bank account of his own at the time. How large it was does not appear, but it is shown that he drew two checks on it—one for \$250 and one for \$50, on the very day the account was settled, and that such checks were paid. Second, on the statement of the accused, as a business proposition, it does not seem reasonable to us that a man of Mr. Simpson's intelligence would hand over \$150 in cash as a loan without security, and from money which was not his own, to a man who he claims was to his knowledge at that time financially irresponsible and against whom he had just settled a \$500 claim for only \$250. In connection with Simpson's explanations we cannot overlook the evidence of one Frank Stone, a witness for the accused. After testifying that he was a deputy sheriff in Stark county in 1895, and that some time in that year he received a summons and complaint for service from Simpson against Lewis Christensen in a case wherein the Holter Lumber Company was plaintiff, and that he

served such papers, he was interrogated by Mr. Simpson as follows :

"Q. State whether or not you saw him afterwards and had a conversation with him with reference to the same suit some time in 1897? A. I did. Q. Did he say anything to you with reference to that suit at that time? A. Yes sir. Q. State what it was. A. He said he had settled it. Q. Did he state how much he settled for? A. He said he settled it for \$300. Q. Are you sure about \$300? Did he say how many payments he had settled it in? A. He said he settled it. Q. What were the amounts of those payments? A. I think if my memory serves me right he said he had made two payments and that one of the payments he had made then and he had time on the other one. Q. Are you sure he said \$300? A. I won't be positive but I think he said \$300. Q. Did you not tell me that he stated he had paid that bill in two payments, one for \$100 and one for \$150. A. He said he had paid it in two payments. Q. Did you not tell me that he said that one was a \$100 payment and the other a \$150 payment? That is what I understood you. A. If I told you that, that is what he said. Q. Are you sure at this time as to the amount he did tell you? A. I think he did say that he paid it for \$250. He paid it in two payments; that is what he told me."

When we consider the very cordial relation which is shown to exist between this witness and the accused we are of the opinion that his twice repeated statement that Christensen said he settled it for \$300 corresponds very closely with the truth. However, if the statement of the accused is accepted as true, that he only received \$250 and immediately loaned \$150 of it to Christensen, still it does not place him in any better position than if he had kept the entire \$250 himself. It is entirely clear that the money which was paid to the accused by Christensen on the account belonged to his client in Montana and that he merely held it in trust for remittance or subject to his client's order. If he did in fact loan Christensen \$150 of the money so received, as he claims, it was a loan on his own account and for his own benefit, was without authority from and was a fraud upon his client and was a felonious act under section 7464, Revised Codes, which reads as follows: "If any person being a trustee, banker, merchant, broker, attorney, agent, assignee in trust, receiver, executor, administrator or collector, or being otherwise entrusted with or having in his control property for the use of any other person, or for any public or benevolent purpose, fraudulently appropriates it to any use or purpose not in the due and lawful execution of his trust, or secretes it with a fraudulent intent to appropriate it to such use or purpose, he is guilty of embezzlement."

The facts as to this collection under any interpretation which may be given them also bring the conduct of the accused under section 428, Rev. Codes, which provides that "an attorney and counselor who is guilty of deceit or collusion, or consents thereto, with intent to deceive a court, judge or party to an action or proceeding is

liable to be disbarred and shall forfeit to the injured party treble damages, to be recovered in a civil action."

So also the continuance of the action by the accused for fully two years after the account was paid and for his own personal benefit, constituted a wilful violation of his duty as an attorney as prescribed by subdivisions 2 and 6 of section 427, Revised Codes, which duties are as follows: Subdivision 2. "To counsel and maintain no other actions, proceedings or defenses than those which appear to him legal and just, except the defense of a person charged with a public offense." Subdivision 6. "Not to encourage either the commencement or continuance of an action or proceeding from any motive of passion or interest." These violations of his duty were both willful and corrupt and constitute grounds for disbarment under subdivision 3, section 433, Revised Codes. In reaching a conclusion that the accused is guilty of the acts charged, in reference to this collection, we have occasion to look no further than to his letters, the receipted account and his oral admissions.

We will next consider the evidence as to the several alleged violations of his duty in connection with the unlawful sales of intoxicating liquors. All of these alleged breaches of duty were in his capacity as state's attorney of Stark county. The obligation which a state's attorney owes to the state is the subject of express legislative provisions which measure the duties of his employment. Some of the duties which are laid upon the accused under the prohibition law of this state, and the only one to which we need refer, are found in section 7604, Revised Codes, the same being a part of chapter 63 of the Penal Code, which relates to the unlawful dealing in intoxicating liquors. So far as pertinent it is as follows: "It shall be the duty of the state's attorneys diligently to prosecute any and all persons violating any of the provisions of this chapter, in their respective counties, and to bring suit upon all bonds or undertakings forfeited, immediately after the happening of such forfeitures, to recover the penalty, and to pay all money so collected, as herein provided, into the treasury of said county, and to take a receipt of the treasurer therefor. * * * If any state's attorney shall fail, neglect or refuse to perform faithfully any duty imposed upon him by this chapter, he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than one hundred nor more than five hundred dollars and be imprisoned in the county jail not less than thirty nor more than ninety days; and such conviction shall operate as a forfeiture of his office, and the court before whom such conviction may be had shall order and adjudge such forfeiture of office in addition to the fine imposed as herein provided." It is shown that in January, 1897, a number of persons in Dickinson, Stark county, were openly engaged in the business of unlawfully selling intoxicating liquors. On January 7th, 1897, the board of county commissioners of that county, adopted the following resolution: "Be it resolved by the board of county commissioners, of Stark county, North Dakota, that any person or

persons, company or corporation, desiring within this county now or hereafter while this shall be in force to engage in the business of dispensing liquid drinks, or keeping a place commonly resorted to for the purpose of drinking, shall first procure a license therefor as follows: To those engaged or desiring to engage therein within the town of Dickinson, including south Dickinson, they shall pay unto the county treasurer the sum of \$40 per month, one-fourth in advance. To those thus engaged or hereafter to engage therein within said county and outside said town of Dickinson, the sum of \$25 per month, one-fourth in advance. Provided, that any person, persons, company or corporation not engaged therein at this time, and who shall thus engage subsequent to the first day of April, 1897, shall pay the full license fee therefor from January 1st, 1897. Said license shall be issued by the county treasurer of said county and shall be approved by the chairman of the board of county commissioners and the said license shall be issued for three months and each quarter upon payment in advance of the required sum for the ensuing three months, shall be renewed by a written endorsement thereon, duly signed by the treasurer. The sums of money received by said source said treasurer shall, less the expense of enforcing said resolution as approved by the chairman of the board and attested by the state's attorney, be given into the general fund of the county at the beginning of each quarter. Passed January 7, 1897. W. A. McClure, Chairman. Attest: John Leask, County Auditor."

These licenses, it will be seen, by the express language of the resolution, extended to the "business of dispensing liquid drinks, or keeping a place commonly resorted to for the purpose of drinking." This language quite accurately describes the public saloon. But aside from this it is entirely clear under the evidence that the license was understood and intended to cover the sale of intoxicating liquors. It is shown that under the system inaugurated by the foregoing resolution, during the months of January, February, March, April, May, June, and July, of that year, altogether eleven different persons took out licenses and paid money to the county treasurer. All of the persons named in the accusation as being engaged in the saloon business, except Berry, are shown by the treasurer's record to have paid the license fee exacted by the foregoing resolution, and Berry testifies that he paid license, but the treasurer's record does not so show. It shows that \$1,540 was paid in and names the persons from whom it was received. This sum was disbursed by the treasurer as follows: For printing, \$7.50; to Charles Kono, \$8; to Leslie A. Simpson, \$619.50, the latter being in five payments; \$905 was turned into the general county fund. On September 25, 1895, the accused published the following letter in the Dickinson Press over his own signature, evidently in justification of the course pursued by him and the county commissioners in licensing such unlawful business, which evidently had become a subject of criticism:

"Mr. Simpson's Statement: Dickinson, North Dakota, Sept. 22, 1897. To the Editor of the Press: As the editor of the Recorder

for several weeks with a persistency worthy of a better cause, has been publishing a series of absolute falsehoods relative to the proceedings of the county commissioners and myself as state's attorney, regarding the issuance of licenses to persons in the county engaged in dispensing liquid drinks, and as the said editor has given publicity to the petition which reflects upon the commissioners and myself, I deem it not out of place to make a few statements of the facts which the Recorder ignores relative to the matter. Before the places in question were granted licenses a petition directed to the county commissioners and myself and signed by about 400 taxpayers in the county, besides other men who were at that time engaged in business in Dickinson, with one exception, was presented asking that persons engaged in the business of selling liquid drinks, using the words of the petition, be required to pay a license. * * * This petition was signed by the editor himself and may be seen at my office with the signatures. It was in response to this petition, so liberally signed, that the places were licensed. Under that system the \$1,825 have been paid in. Of this \$547.50 has been paid to the county treasurer and state's attorney for collecting same, so that by deducting 25 per cent of the total collected, the balance of \$1,277.50 less about \$15 for expenses goes to the county, and is now in the hands of the county treasurer. Those sufficiently interested may verify these facts by going to the county treasurer's office. The figures published in the Recorder and named in the petition are false. They were known to be false when published. In the meantime the county treasury is richer by a sum sufficient to pay the total year's salary of the clerk of court and state's attorney, and half the salary of the county superintendent with only six month's collections, and that is from a source from which the county never before received a cent. If the license is wrong a majority of the voters have asked for it and the commissioners are carrying out their wishes in the matter. The county commissioners and state's attorney are large taxpayers and each one is individually interested in the welfare of the county. (Signed) Respectfully, L. A. Simpson."

The evidence is conclusive and in fact it is not disputed that the places licensed were public saloons, and it is also entirely convincing that the accused knew their real character and that the words "liquid drinks" used in the resolution and licenses were intended to mean intoxicating liquors. It is clear that the various parties paid their money for the purpose of being allowed to sell intoxicating liquors and that it was received for that purpose. But were we able to ignore the evidence on this point and conclude that the licenses issued extended only to a lawful business and adopt the further legal absurdity that the county could exact a license fee for conducting such lawful business, and that these various sums of money were lawfully paid to and received by the county, still such concession would not make the act of the accused in exacting 25 per cent commission lawful. The salary of the state's attorneys is fixed

by section 2058, Revised Codes, and he is prohibited by section 1983, Revised Codes, from receiving any fee or reward for any services or business to which it shall be his duty to attend. The exaction of the sums of money from the county, which the accused is shown to have received, would in that event be unlawful and he would be subject to removal from office under section 7838, Revised Codes, providing for the removal of officers for charging and collecting illegal fees. The direct connection of the accused with these unlawful acts is shown by the undisputed evidence that he went with two of the county commissioners and presented a copy of the resolution before set out, to one or more of the persons engaged in such unlawful business and threatened to prosecute them unless the license fee so exacted was paid. Pisha testifies that he paid his license fee direct to the accused and received his license from him personally. It seems that in July, 1897, the county officers refused to be further connected with the license system or to receive money from the persons engaged in such unlawful business. Thereafter and on December 29th, Simpson made affidavits accusing the various persons named in the accusation as engaged in such unlawful business with conducting saloons wherein intoxicating liquors were sold contrary to the law of this state, and also verified complaints in each of the actions, which complaints set out such violations in detail. Injunctions and search warrants were issued against these several places and the sheriff of Stark county closed such places thereunder. Early in the next month, January, 1898, and while their places were still closed, a number of the persons whose places had been closed by the proceedings referred to, held a meeting in the office of the accused for the purpose of arranging about opening again and resuming business. Several of the persons present at that meeting seemed to have no distinct recollection of the occasion which called them there, or what occurred. Two of them, however, have,—Pisha and McGinley,—and they have given an intelligent version of what transpired, and it has not been contradicted by the accused. Michael McGinley says he was present and that the purpose of the meeting was to “try and make arrangements to open these places again.” “I think the proposition was that we pay \$50 a month for the privilege of opening again.” “So far as I understood Frank Kihm was to do the collecting.” “The money to be paid was for the same purpose as was paid to the county officers.” “They had made arrangements to have him (Kihm) as collector of this money which was supposed to be for the permission to sell liquid drinks in the town of Dickinson.” “It was simply said that the person who wanted to sell liquid drinks should pay Mr. Kihm \$50, but it was not disclosed by the meeting what he was to do with it.” “I supposed it was a fund to be raised from all the houses.” “It was to help the thing along I believe.” “Yes, I believe I asked Mr. Simpson myself, as I remember it, what was to be done with it and he said it was to go of course to the county after the expenses of collecting was taken out.” “As I understood

it he (Simpson) was to get 25 per cent. of the whole of it." Pisha's testimony as to the arrangement made at the meeting for opening their places of business corresponds with that of McGinley before set out. Pisha says: "We were called in at the meeting for the purpose of opening up a new place again in a new style for \$50 a month." "I understood it was put up to Mr. Simpson for letting us run the business again." "He (Simpson) said he would not collect the money. He says he dasent but if we wants to run business we should elect a collector ourselves, the collector give us a receipt for the money he collects for Simpson. That is the way I understood." "He (Simpson) says we put up the money \$150 for three months. He would protect us and we would not be pulled at all. Who didn't put up \$150 he would be pulled." "The talk was between us (Kihm, Berry and Pisha when the money was paid). We paid the money to Kihm. He is collector and he give us receipt and we be protected from Simpson. That means we pay him \$150 and we can go ahead in business; he would not bother us any more." "Mr. Simpson says any man comes here and open up a saloon and if he has not paid \$150 he close him up." "I asked him if it comes somebody from these big offices from below, Fargo or Bismarck up here. He says no trouble comes here against selling. He says they would write to him, to the county attorney, and he says I am all right with those officers, and he is general assistant deputy," meaning assistant attorney general. In pursuance of such agreement Pisha gave to the Frank Kihm referred to, a check for \$150 on February 3, 1898, and received his written receipt therefor. The check was cashed and both the check and receipt are in evidence. He also paid him the further sum of \$50 on May 3, 1898, for the same purpose and received a written receipt which is also in evidence.

E. J. Berry, who was also closed up by the injunctional proceedings referred to, was at the meeting in Simpson's office. He not only testifies to paying the county treasurer for licenses during the license period, but in reference to the meeting in Simpson's office says: "We was there to straighten up the injunction cases. It was in connection with that that I went there to meet the sheriff," who he says was there also.

"Q. Now after your injunction was dissolved did you put up any money for the privilege of running your place? A. Yes sir, and still pay for privileges. Q. Up to this present time? A. Yes sir. Q. You never paid Mr. Kihm? A. Yes, I paid Mr. Kihm \$75 on two occasions. Q. For what consideration did you pay him? A. For him to use what influence he had to arrange in opening our places of business. Q. That was after you had been closed up? A. Yes sir. Q. After the injunction was dissolved?" A. Yes sir. Q. And about the time you opened up again? A. Yes sir. Q. How did you fix \$75?" A. We arranged among ourselves that by the use of so much money the chances were that we could run our places."

Simpson's active connection with the maintenance of such unlaw-

ful business is perhaps sufficiently shown by the foregoing evidence, but there is further evidence in the record of his actual knowledge of the character of these places. It appears that in the spring of 1898 the accused joined the volunteer troops from this state and was absent from his office at Chickamauga Park for several months. He left his office in charge of one William Thaw Denniston, who is one of his accusers. Denniston testifies that Mr. Kihm came to Simpson's office when he was there and that "he (Kihm) said he had some money for me or for Mr. Simpson. I told him to make a statement of the items and the amounts so that I could forward them to Mr. Simpson and he could either deposit the money in the bank to Mr. Simpson's credit or give it to me and I would do so. He refused to make any note of the items and after some time he finally told me this money was \$200; that it was for payment for protection from four places for selling intoxicating liquors in Dickinson for which he was collector and he said he wanted or they wanted these two new places closed up. Then I told him to bring complaint. He refused and said as they were paying heavy protection they thought they were entitled to have protection, and he said there were four of them running and paying \$50 per month and that he was, so to speak, collector for the four. I do not remember whether he used the word collector or not but he said that in substance. I told him that I would take no action in the matter but that I would write to Mr. Simpson immediately and tell him the facts and that Mr. Simpson could do as he pleased." Denniston testifies that he did write the substance of the foregoing to Mr. Simpson and produced a letter written by the latter from Chickamauga Park which is, in part, as follows: "Dear Denniston: * * * I do not know what Kihm has told you as you did not state. So far as the 'liquid drink' places are concerned, four are all I propose to have run there (or five at the outside) while I am prosecuting attorney. If any more start I want injunctions issued against them. The prohibition blanks are in my office. * * * This letter is in evidence and the accused admitted upon his cross-examination that he wrote it. The fact that the accused directed Mr. Denniston to proceed against such "liquid drink" places as should start, beside the favored four or five, under the provisions of the prohibition law, clearly shows that the expression "liquid drink places" had a local signification in Dickinson and was intended to designate what is known in states where the business is lawful as saloons. It is shown that after the meeting in Simpson's office these places re-opened and continued business as before. Three at least are shown to have moved their saloon fixtures from one side of the building to the other and there is evidence that this was done at Simpson's direction and that in one or more instances he stated that the injunctions covered but a part of the building. Just what legal steps were taken to open the buildings is not clear. Some of the witnesses testified to giving bonds and paying costs. The accused

states that bonds were given and orders were obtained from the judge of the District Court for Stark county dissolving the injunctions. We think it is an established fact that bonds were given by some if not by all the defendants in the action. None of the original papers appear to be in existence. None of them were filed in the clerk's office and there is no public record of the payment of the costs in any of the cases or that any such cases ever were in existence. The judge of the District Court was called as a witness for the accused and it is significant that he was not questioned as to the issuance of any orders of any kind in any of these cases. The accused obtained possession of the copy served upon Kihm and it appears that with one exception the other copies were lost. Mr. Simpson states that he turned over all of the original papers to Frank P. Stone, deputy sheriff of Stark county, when he joined the army, some months after they were served and that he has not seen them since. The latter states that he took the papers to his house and put them in a bureau drawer. When required by a subpoena to produce them he reported that they could not be found. A similar condition exists as to other records relating to the license period. The license resolution passed by the county commissioners was not spread upon the minutes of their proceedings, but was committed to a separate paper which is now lost. The records of the county treasurer's office showing the receipts and disbursements under the resolution were kept in a small book unknown to the regular county records; that book is also lost. The funds were disbursed under a special form of warrant; all of these warrants are also lost. The licenses issued and receipts for payments are, with one or two exceptions, lost. Not only has there been a general disappearance of documentary evidence relating to these unlawful acts, but there is also a marked failure of memory on the part of the persons connected with them. Sufficient facts have been shown, however, to make it clear that the accused not only violated his duty under section 7604, *supra*, by failing to prosecute, but that he willfully, corruptly and actively encouraged violations of the very law which he was bound as state's attorney to enforce, and these from purely mercenary motives; and, further, that the injunctive proceedings were instituted by him, not with a view to permanently discontinue sales of intoxicating liquors, but for the purpose of exacting further revenue from the persons engaged in such unlawful business. The legislature has denominated these acts as a misdemeanor under section 7604, *supra*, and in addition to forfeiture of office has affixed the further penalty of fine and imprisonment. The acts constituting such misdemeanor involve moral turpitude and are grounds for disbarment under subdivision 1 of section 433, Revised Codes.

The facts established give us no discretion in passing judgment. The acts done by the accused were knowingly and corruptly committed by him. He is shown to have been willfully false to a private client and to the state as state's attorney. His general atti-

tude toward the administration of justice and his conduct as an attorney have come under our immediate observation during the progress of these proceedings and both confirm the conclusion that he lacks that high sense of personal and professional integrity which is a paramount qualification in an attorney and counselor-at-law. His answer to the charges is evasive and does not speak the truth. The statement that the Christensen settlement "was in every way to the interest of his client and to his client's satisfaction, then and now, and that in all things connected therewith he was faithful to his client's interests" is shown by the deposition of James Donovan to be entirely false. Neither has he aided the court in its efforts to ascertain the truth in any stage of the proceedings. His attitude, on the contrary, has been to conceal and suppress the facts. Donovan testifies that the accused called on him at Great Falls on January 11th of the present year. "He asked me not to testify against him in this matter. He stated that I could refuse to obey the notice or subpoena to testify if I so desired." There is evidence also that he advised one or more of the witnesses for the prosecution at Dickinson that they need not obey the subpoena of the referee, and the referee's record shows that in several instances when the witnesses for the prosecution were being examined in chief the accused interfered and instructed such witnesses that they could decline to answer. His treatment of opposing counsel and witnesses has been persistently and grossly insulting. In two instances his language in reference to two witnesses before the referee is too indecently vile to be reproduced. In his answer and at various times during the proceedings he asserted that Denniston had taken from his office various papers which he was unable to produce at the request of the prosecution. These accusations were without excuse or provocation. There is no evidence that such papers were taken by Mr. Denniston and no reason is given for even a suspicion that such was the case.

It is urged that the motive which prompted the accusers to file the accusations was personal. That may be true, but it does not weaken the force of the facts proved or alter our duty with regard to them. We may say, however, that the facts proved fully justify their course and that in calling the court's attention to the gross misconduct of one of its officers they were acting strictly in the line of duty.

A number of witnesses have testified to the good standing of the accused at the bar in his judicial district, including witnesses from Stark, Billings, and Burleigh counties. Some of them are lawyers, others men of prominence in public affairs. If the evidence was doubtful or if the unlawful acts which the accused has committed could be excused on the ground of ignorance or mistake such evidence of reputation would have great weight, but under the facts as we find them evidence of reputation cannot be permitted to prevail against the gross violations of duty of which the defendant has been guilty. So, too, the accused has produced a number of witnesses

who attack the veracity and professional standing of Mr. Denniston, one of the accusers. This evidence is also unimportant, as the unprofessional acts alleged to have been committed by the accused are clearly established without the evidence of the latter, and it need not be further referred to. Proof of the good professional standing of the accused in his judicial district or of the bad reputation of Mr. Denniston, cannot remove the corrupt character of the offenses of which he has been guilty. Neither can it avert the severe penalty which the law attaches to such misconduct.

A preliminary motion was made to quash this proceeding upon the ground that this court is denied original jurisdiction to entertain it under section 86 and 87 of the state constitution. We are entirely clear that a disbarment proceeding is not within the spirit and meaning of the constitutional inhibition contained in the sections referred to. The power to discipline attorneys, who are officers of the court, is an inherent and incidental power in courts of record, and one which is essential to an orderly discharge of judicial functions. To deny its existence is equivalent to a declaration that the conduct of attorneys towards courts and clients is not subject to restraint. Such a view is without support in any respectable authority and cannot be tolerated. Any court having the right to admit attorneys to practice, and in this state that power is vested in this court, has the inherent right in the exercise of a sound judicial discretion, to exclude them from practice. The statutory provision found in section 432, Revised Codes, authorizing this court to suspend or disbar an attorney for unprofessional conduct is merely a legislative affirmation of a power which already existed. In support of the foregoing see: *Ex parte Wall*, 107 U. S. 265, 27 L. Ed. 552; 2 S. C. Rep. 569; *In re Mills*, 1 Mich. 392; *People v. Ford*, 54 Ill. 520; *In re Secombe*, 19 How. (U.S.) 9, 15 L. Ed. 565; *In re Garland*, 4 Wall. 333, 18 L. Ed. 366, and numerous cases cited in 6 Enc. Pl. & Pr., on pages 711 and 712.

It is also well settled that an appellate court possesses the power by an original proceeding to suspend or disbar an attorney for unprofessional conduct in a lower court. So also a state court may discipline counsel for unprofessional acts committed in the federal courts. On this point see cases cited in 3 Am. & Eng. Enc. L. (2d Ed.) pages 300 and 301, and note, and this inherent power in the judiciary cannot be defeated by the legislative or executive departments.

The judgment of the court is that the license of the accused to practice in the courts of this state be, and the same is hereby revoked and canceled, and the clerk of this court is directed to strike his name from the roll of attorneys.

(83 N. W. Rep. 541.)

STATE OF NORTH DAKOTA vs. JAMES MONTGOMERY, *et al.*

Opinion filed October 11, 1908.

Assault and Battery—Verdict Sustained by Evidence.

Evidence examined and *held* that the verdict has substantial support in the evidence.

Error Without Prejudice.

Held, further, on ground set forth in the opinion, that certain rulings of the trial court, made in the progress of the trial, were not erroneous and could not have been prejudicial to any of the substantial rights of the defendants, and hence that such rulings furnished no ground for reversing the judgment.

Reasonable Doubt—Definition.

In the course of its charge the trial court defined a reasonable doubt of the guilt of the defendants to be "a doubt that the reasonable man can present and explain." *Held*, that this definition, while open to criticism, was not prejudicial to the defendants. The propriety of attempting to define a reasonable doubt questioned.

Appeal from District Court, Eddy County; *Glaspell, J.*

James Montgomery and Maggie Montgomery were accused by information of assault and battery, while armed with a dangerous weapon, with intent to do bodily harm. They were found "guilty of an assault with provocation." They appeal from the judgment of conviction.

Affirmed.

T. F. McCue, for Appellant.

The complaining witness was erroneously permitted, over defendants' objections, to testify to conclusions and to assume facts not in the record. *Curl v. Chicago, Etc., Ry. Co.*, 63 Ia. 417; *Peo. v. Lange*, 90 Mich. 454, 51 N. W. Rep. 534; *Peo. v. Westlake*, 62 Cal. 305. The definition of a reasonable doubt as given to the jury was incorrect. *State v. Sloan*, 55 Ia. 217; *Territory v. Bannigan*, 1 Dak. 451, 46 N. W. Rep. 597; *State v. Sauer*, 38 N. W. Rep. 355. The court's instruction in the following language was erroneous: "It is also possible in this case, if the jury accepts and believes the witnesses on the part of the prosecution, to find the defendants, or one of them, guilty of a simple assault." The word "possible" means that which can be done, and as used in this instruction was an expression of opinion as to the weight of evidence, and erroneous. *Territory v. O'Hare*, 1 N. D. 36, 44 N. W. Rep. 1003.

P. M. Mattson, for the State.

The court's definition of a reasonable doubt was sufficiently explicit when read in connection with other instructions in the case. *U. S. v. Adams*, 2 Dak. 305; *State v. Currie*, 8 N. D. 545. The instruction challenged, that it was possible to find the defendants

guilty of a simple assault, is justified by § 8244, Rev. Codes; 6 Enc. Pl. & Prac. 691; *Peo. v. Neumann*, 48 N. W. Rep. 290.

WALLIN, J. The appellants were accused by an information filed against them of the crime of assault and battery while armed with a dangerous weapon, and with intent to do bodily harm. A trial was had, and the jury found defendants "guilty of an assault with provocation," whereupon the district court entered its judgment sentencing the defendants individually to pay a fine of \$50. Defendants have appealed from such judgment, and the record sent here embraces a statement of the case containing the evidence and certain exceptions.

A motion in arrest of judgment was made and denied in the District Court, and this ruling is assigned as error. The grounds of the motion appear in the record, but, so far as appears, said motion was not made upon any defect, or alleged defect, in the information, but the same rests wholly upon other alleged errors of procedure at the trial and in the verdict. This assignment must therefore be overruled, for the reason that the motion was not made upon any ground upon which the motion can lawfully be made or sustained. See Rev. Codes 1899, § 8275. We have, however, examined the information, and are of the opinion that the same is legally valid, and that it sufficiently charges the offense named therein. The offense of which the defendants were found guilty—that of an assault—is an offense the commission of which is necessarily included in the offense charged. The words "with provocation," which were added in the verdict after the word "assault," are, we think, entirely harmless. They do not render the verdict obscure in meaning, nor do they suggest or import that the accused were, in the opinion of the jury, guilty of any offense other than assault. See *State v. Maloney*, 7 N. D. 119, 72 N. W. Rep. 927.

A motion for a new trial was likewise made by the defendants, and was denied. This ruling is also assigned as error in this court. The grounds of this motion include alleged errors in the rulings made by the trial court relating to the admission of the evidence and to the instructions given to the jury, and defendant further contends that the verdict itself is contrary to law and is not justified by the evidence. As has been seen, we are of the opinion that the verdict is not contrary to law, but is a verdict entirely proper under the charge made in the information, in any case where the evidence does not warrant a conviction of the offense charged, but does warrant a conviction of the minor offense of an assault without any felonious intent. It is the theory of the defendants' counsel that the evidence shows that whatever acts were done by the defendants in the way of violence upon the person of the complaining witness were done in resisting a trespass upon their premises, which the complaining witness was then in the act of committing, and that such violence was so tempered that it did not go beyond the exercise of their legal rights in defending their premises and defending themselves against assaults then made upon their persons

by the complaining witness. We have read and carefully considered all the evidence in the record, and we readily concede that there is evidence which will fully sustain the contention of counsel; but, on the other hand, there is clear and positive evidence of an assault which cannot be justified upon any theory of self-defense. This being the condition of the evidence, the case was one lying peculiarly within the province of a jury to determine, and inasmuch as the evidence is conflicting, and as there is substantial evidence to sustain the verdict, we are in duty bound not to disturb the same on the ground of the alleged insufficiency of the evidence.

We have examined the assignments of error predicated upon rulings made by the trial court during the elicitation of the evidence, and we are entirely clear that none of them are erroneous, and none, in our judgment, are of sufficient importance to justify their further discussion in this opinion; nor, in our opinion, could the rulings here complained of have prejudiced any of the substantial rights of the defendants. Such rulings, whether erroneous or not, do not furnish grounds for reversing a judgment of conviction. See *State v. Maloney*, *supra*.

The instructions given in charge to the jury were quite full, and, in our judgment, they fairly presented the law of the case applicable to the testimony with reference to the defendants' theory of the evidence as well as that of the state. It was the duty of the court, in view of the charge as stated in the information, and especially in view of the conflicting character of the evidence, to state to the jury that it was legally possible for them to convict the defendants of either the offense named in the information or of certain other minor offenses legally inhering in the offense charged. In the discharge of this duty the court used the following language: "An assault is any willful and unlawful attempt or offer, with force or violence, to do a corporal hurt to another. If you find in this case that there was an assault committed, but it was not made with a dangerous weapon, and was not made with any intent to do a bodily harm to the person of Kennedy, then it would be your duty to render a verdict of guilty of an assault. In other words, the court charges the jury that it is possible, under the evidence in this case, to find these defendants or one of them guilty of an assault as charged in the information,—an assault to do bodily harm,—providing you believe the witnesses for the prosecution. On the other hand, it is also possible in this case, if the jury accepts and believes the witnesses on the part of the prosecution, to find the defendants, or one of them, guilty of a simple assault." Counsel criticises this language as invading the province of the jury, and contends that the court in this instruction ignored the evidence offered by the defense, and, in effect, told the jury to convict of an assault if they believed that the witnesses for the state told the truth. We cannot so construe this instruction. We think the fair import of the language is to state that, under the law and in view of the conflicting evidence in the case, the jury would be justified, if they believed

the evidence offered by the state, to acquit of the grosser offense, and convict of the simple assault, provided the jury also found that the assault was not made with any dangerous weapon or with a felonious intent. We are of the opinion that the language was not only appropriate to the case, but that it was wholly favorable to the accused, and hence could not have been prejudicial.

We shall notice but one further criticism upon the charge to the jury, which arises upon the following language: "The burden of proof is upon the state to establish the guilt of the defendants to your satisfaction and beyond any reasonable doubt. You are the judges of all questions of fact in the case, including the credibility of the witnesses that have testified before you, and you must determine these questions under the rules of law as the court now gives them to you. The defendants are presumed to be innocent until the contrary conclusively appears by competent evidence introduced here in court. The jury start out with the supposition, to begin with, that the defendants are innocent, unless the contrary has been established satisfactorily to you beyond any reasonable doubt. A reasonable doubt, however, is not an imaginary doubt. It is not something which can be called up by some one who has a prejudice against the prosecution of the defendants, but it is a doubt that the reasonable man can present and explain." Counsel insists that the words, "can present and explain," are a misleading definition of a reasonable doubt, and, as such, are prejudicial, and cites *State v. Sloan*, 55 Ia. 217, 7 N. W. Rep. 516; *Territory v. Bannigan*, 1 Dak. 451, 46 N. W. Rep. 597; *State v. Sauer* (Minn.) 38 N. W. Rep. 355. We have examined these cases, and find that none of them are in point except that of *State v. Sauer*. That case is, in our judgment, fairly in point, and is also authority against the position of counsel. In that case the trial court instructed the jury that a reasonable doubt of the prisoner's guilt means a doubt "for which you can give a reason." This point was overruled, and the Supreme Court held that, while this definition was faulty and not to be commended, the same was nevertheless not prejudicial to the defendant. In the course of the opinion the court cited *Com. v. Harman*, 4 Pa. St. 274, as sustaining the definition given by the trial court in the Minnesota case. We think the definition given in the case at bar is equivalent in meaning to that employed in the case from Minnesota. To say that a reasonable doubt means a "doubt that a reasonable man can present and explain" is, in our judgment, equivalent to saying that such a doubt is one "for which you can give a reason." It is our opinion that the definition, while open to criticism on grounds set forth in the case of *State v. Sauer*, is nevertheless not dangerously misleading, and is therefore not prejudicial to any substantial right of the defendants.

This disposes of all the assignments of error which we deem it necessary to consider, and our views as above expressed will necessitate an affirmance of the judgment; but with respect to the matter of defining, or attempting to explain, what constitutes a rea-

sonable doubt in a criminal case, we deem it not out of place to quote the language of the eminent jurist who formulated the opinion of the court in the case of *State v. Sauer*, supra, which is as follows: "The term 'reasonable doubt' is almost incapable of any definition which will add much to what the words themselves imply. In fact, it is easier to state what it is not than what it is, and it may be doubted whether any attempt to define it will not be more likely to confuse than to enlighten a jury. A man is the best judge of his own feelings, and he knows for himself whether he doubts better than any one else can tell him. Where any explanation of what is meant by a reasonable doubt is required, it is safer to adopt some definition which has already received the general approval of the authorities, especially those in our own state." Similar views have been expressed by many courts of high standing. See *Hamilton v. People*, 29 Mich. 194; *People v. Stubenvoll*, 62 Mich. 329, 28 N. W. Rep. 883; *State v. Reed*, 62 Me. 142; *Mickey v. Com.*, 9 Bush 593; *Miles v. U. S.*, 103 U. S. 304, 26 L. Ed. 481; *State v. Kearley*, 26 Kan. 87. The practical lesson to be learned from these cases is that attempts to define a reasonable doubt seldom, if ever, do any good, and that the attempt is always fraught with the danger of committing prejudicial error. We are clear that no error can be predicated upon the mere omission of a trial court to define a reasonable doubt, in the absence of a specific request to do so, nor are we satisfied that it would be prejudicial error to refuse on request. If, however, the trial court should, in any case, attempt to define a reasonable doubt, the only safe course to pursue is to resort to some definition which has the approval of the authorities, and thereby avoid the dangers incident to any hastily framed definition. The judgment is affirmed. All the judges concurring.

(83 N. W. Rep. 873).

STATE OF NORTH DAKOTA vs. ROBERT H. STEWART.

Opinion filed October 17, 1900.

False Pretenses—Definition.

The false pretense, referred to in section 7489, Rev. Codes, which provides the punishment for obtaining the signature or property of another by color or aid of any false token or writing, or other false pretense is such a fraudulent representation of an existing or past fact, by one who knows it not to be true, as is adapted to induce the person to whom it is made to part with something of value.

Writing Adapted to Deceive.

The false pretense may consist of oral or written representations, and when in writing it is not necessary, as in a prosecution for forgery, that such writing shall purport to create a right or obligation. It is sufficient if it is adapted to deceive the person to whom presented, and in fact does deceive him.

Test of Sufficiency of False Pretenses.

The question of whether false pretenses set out in an indictment as the basis of prosecution are adapted to deceive is for the jury, unless they are in their nature so absurd and incredible that a conviction would not be sustained; and the test of the sufficiency of the false pretenses is not whether they would deceive a person of ordinary caution and prudence, but whether they did in fact deceive the person alleged to have been defrauded.

Representation to Agents.

A false representation made to an agent of the person from whom the money or property is obtained, and communicated to and acted upon by such person, is equally punishable as though made to him directly.

Indictment for Obtaining Money by False Token.

The defendant is charged with the crime of obtaining money by aid of a false token. It is alleged that he fraudulently and designedly obtained money from Sargent county by presenting to the county auditor of that county a false certificate as the basis for a claim for a bounty theretofore offered by the board of county commissioners for the destruction of gophers. *Held*, that the question whether said certificate, when considered with the other averments of the indictment, was calculated to deceive, and did deceive, the county auditor, was for the jury; the pretense being neither absurd nor incredible. *Held*, further, that the indictment sufficiently alleges that the money was obtained from the county by aid of such false pretense, and is not open to the objection that it shows upon its face that the defendant obtained property, to-wit: a warrant for the money, by aid of such false pretense, instead of money.

Evidence Sustains Verdict.

It is further *held*, that the evidence fully justified the jury in finding such token was false, in that the defendant had not destroyed gophers in the number or at all, as represented by such certificate, and amply sustains the verdict.

Appeal from District Court, Sargent County; *Lauder. J.*

Robert H. Stewart was convicted of obtaining money by false pretenses, and he appeals.

Affirmed.

T. A. Curtiss, E. W. Bowen and Charles E. Wolfe, for appellant.

The indictment is fatally defective because it fails to state that the certificate declared upon as a false token was not in truth and in fact issued by the township clerk, and was not in truth and in fact his act. In other words, the allegations in the indictment are not direct and certain as regards the particular circumstances of the offense charged. §§ 8039, 8040, Rev. Codes; *Peo. v. Gates*, 13 Wend. 311; *Peo. v. Merriam*, 28 Mich. 255; *State v. Reibe*, 7 N. W. Rep. 140. "Writing" as used in the statute cannot mean anything written upon paper not purporting to be of any force or efficacy, but some written paper purporting to have been signed by some person, and such writing must be false. *Peo. v. Gates*, 13 Wend. 311. The false use of a genuine writing, is not the use of a false token or writing. *Schafer v. State*, 82 Ind. 223; *Peo. v.*

Galloway, 17 Wend. 540. The certificate declared upon is not such an instrument as can be made the subject of forgery. 8 Am. & Eng. Enc. L. 457, 461; 2 East's P. C. 953; *Johnson v. State*, 23 Wis. 504; *Peo. v. Shawl*, 9 Cow 778; *State v. Lytle*, 64 N. C. 255; *Peo. v. Harrison*, 7 Barb. 560; *Howell v. State*, 37 Tex. 599; *Peo. v. Mann*, 75 N. Y. 484; *Roode v. State*, 5 Neb. 475; *Peo. v. Tomlinson*, 35 Cal. 503; *Territory v. DeLena*, 41 Pac. Rep. 618; *Waterman v. Peo.*, 67 Ill. 91; *State v. Cook*, 57 Ind. 574; *State v. Wheeler*, 19 Minn. 98; *State v. Briggs*, 34 Vt. 501; *Rollins v. State*, 22 Tex. App. 521; *Murray v. State*, 50 S. W. Rep. 521. If the defendant could not have been convicted of forging this instrument, because the instrument is apparently void and not calculated to deceive, then he could not be convicted of the offense of obtaining money or property upon it by false pretenses. *Peo. v. Galloway*, 17 Wend. 540. The defendant, instead of receiving money as alleged, received a county warrant. If the token was a false token, the indictment should have been for obtaining property and not money. *Com. v. Howe*, 132 Mass. 250; *Schlasinger v. State*, 11 O. St. 609; *Reg. v. Brady*, 26 Upper Can. Q. B. 13, 7 Am. & Eng. Enc. L. 789; *Com. v. Gately*, 126 Mass. 52. It was error to receive in evidence the resolution passed by the board of county commissioners because of a fatal variance between the resolution offered and that set forth in the indictment. The indictment sets out the resolution as "a resolution in the following words and figures, that is to say." This designation of the resolution requires that it be set forth word for word and figure for figure, an exact reproduction of the original. Whart. Crim. Pl. & Prac. (8th Ed.) 168. There was a fatal variance in the failure to prove the instrument verbatim as laid. *State v. Fallon*, 2 N. D. 510; *Sharky v. State*, 54 Ind. 188; *Haslitt v. State*, 79 N. W. Rep. 115; *Sutton v. State*, 79 N. W. Rep. 154; *Robinson v. State*, 43 S. W. Rep. 526. As no prosecution can be founded upon this certificate upon the ground set forth in the indictment, no new trial should be had, but the judgment should be reversed and the defendant discharged. *Waterman v. Peo.*, 67 Ill. 91; *State v. Wilson*, 28 Minn. 52.

S. M. Lockerby, P. H. Rourke and J. E. Bishop, for Respondents.

The statement that the certificate was falsely made and forged and wholly fictitious, is a statement of fact. 1 Whart. Prec. Ind. 556; *Com. v. Cole*, 15 Mass. 481. There is no variance between the indictment and proof, but even if a variance is found to exist it is not material, if not misleading, to the defense, or one that might expose the accused to the danger of being put twice in jeopardy for the same offense. Abbott's Trial Brief, § 680, p. 411; *Harris v. Peo.*, 64 N. Y. 148; 3 Rice on Cr. Ev. 170. To be subject of forgery it is not necessary that the instrument should have actual legal efficacy; it is sufficient that it may have such apparent efficacy as notwithstanding its invalidity may render it capable of effecting a fraud. *State v. VanAuken*, 68 N. W. Rep. 457; *State v. Johnson*,

96 Am. Dec. 158, 13 Am. & Eng. Enc. L. (2d Ed.) 1093; *Rembert v. State*, 25 Am. Rep. 639. An instrument valid on its face may be the subject of forgery though collateral facts may exist that would render it absolutely void. 13 Am. & Eng. Enc. L. 1093; *Peo. v. Rathbun*, 21 Wend. 509; *Peo. v. Galloway*, 17 Wend. 540; *State v. Johnson*, 96 Am. Dec. 158; *State v. Hilton*, 39 Kan. 339. An instrument void on its face may be the subject of forgery if extrinsic facts exist by which the holder may be enabled to defraud another and the indictment avers the existence of extrinsic facts. *Rembert v. State*, 25 Am. Rep. 639; *Peo. v. Monroe*, 35 Pac. Rep. 326. The warrant on the treasurer should be considered as representing a step or stage in the same criminal transaction of obtaining money by false pretenses. *State v. Mead*, 44 Pac. Rep. 619; *Com. v. Wood*, 8 N. E. Rep. 432; *State v. McDonald*, 52 Pac. Rep. 433.

YOUNG, J. The defendant was indicted by the grand jury of Sargent County for the crime of obtaining money by false pretenses. The trial resulted in a conviction. A motion for a new trial was overruled, and he was sentenced to imprisonment in the penitentiary for one year. The defendant is charged with having fraudulently obtained money from Sargent County by means of a false, forged, and fictitious instrument presented and used by him as evidencing an indebtedness of the county to him for the destruction of gophers. This is one of a series of offenses which appear to have been committed in that county by various persons, and which are known as the "gopher-bounty frauds." One of these cases, *State v. Ryan*, 9 N. D. 419, was before us at this term. The indictment in that case was for forgery, and is set out in full in the opinion, and is referred to in lieu of an extended statement of facts at this time. The condition which opened the way for the commission of these frauds arose directly from a certain illegal resolution of the board of county commissioners of that county offering a bounty for the destruction of gophers. The resolution offering the bounty provided, as a convenient means of paying such bounties as should be earned under it, "that said bounty shall be two (2) cents for each gopher killed, the same to be paid out of the county general fund upon the warrant of the county auditor: provided, that the county auditor shall issue such warrant upon the certificate of the township clerk of each township wherein such gophers were killed, such township clerk certifying to the number of tails of such gophers killed which were presented to and destroyed by such township clerk." The indictment against the defendant charges that he obtained money from the county by means of the following certificate, which it alleges was falsely made, forged, and wholly fictitious: "County of Sargent, North Dakota, Office of Town Clerk of Harlem Township. To W. S. Baker, County Auditor: This is to certify that L. Lund has presented to me 2,250 gopher tails, which have been destroyed by me this day. Dated at Harlem, this 20th day of June, 1899. R. J. Morrow, Township Clerk." The defend-

ant demurred to the indictment upon the ground "that it does not state facts sufficient to constitute a public offense." This was overruled, and that ruling is assigned as error.

The specific grounds of counsel's attack upon the sufficiency of the indictment are that (1) "it nowhere charges the fact to be that the instrument declared upon as a false token was not made, executed, and delivered by the person whose name was signed to it; (2) the instrument declared upon as a false token is not such, under the law, as could mislead any one."

Neither one of the foregoing objections, in our opinion, is well founded. As to the first ground, namely, that the indictment contains no averment negating the genuineness of the certificate alleged to have been used as a pretense, or alleging the falsity of the pretense used, counsel is in error. It is expressly alleged as to it that, "in truth and in fact, said partly printed and partly written paper was not a good and valid certificate of the facts therein recited, * * * but the same was then and there a falsely made and forged certificate, and wholly fictitious; all of which the said Robert H. Stewart then and there well knew." The false character of the certificate is sufficiently set out in the foregoing averments. It was not necessary to expressly allege that it was not made by the person who purported to make it to give it the character of a false pretense; for, to have that character, it is not necessary that it be a forged instrument. It might be used as a false pretense, although genuine in point of execution, provided its recitals of fact were false, and known to be false by the defendant; and such was the case, as we shall hereafter see.

The contention, however, that the instrument declared upon as a false token is not such a pretense as, under the law, would mislead any one, and is not, therefore, a false pretense within the meaning of the statute, requires more extended consideration. The statute under which the indictment is drawn (§ 7489, Rev. Codes) provides that "every person who, with intent to cheat or defraud another designedly, by color or aid of any false token or writing or other false pretense, * * * obtains from any person any money or property is punishable by imprisonment in the penitentiary," etc. Was the false certificate set out in the indictment a false pretense? Bishop defines a "false pretense" as follows: "A false pretense is such a fraudulent representation of an existing or past fact, by one who knows it not to be true, as is adapted to induce the person to whom it is made to part with something of value." Bish. Cr. Law, § 415. This definition has been universally approved by the courts, *Jackson v. People*, 126 Ill. 139, 18 N. E. Rep. 286; *State v. De Lay*, 93 Mo. 98, 5 S. W. Rep. 607; *Taylor v. Com.*, 94 Ky. 281, 1 S. W. Rep. 480; *State v. Knowlton*, 11 Wash. 512, 39 Pac. Rep. 966; *State v. Vandimark*, 35 Ark. 309; *People v. Jordan*, 66 Cal. 10, 4 Pac. Rep. 77; *People v. Wassercogle*, 77 Cal. 173, 19 Pac. Rep. 270. It is counsel's contention, however, that this certificate, alleged to have been used as a means of defraud-

ing the county, is not adapted to induce any one to part with either money or property, for the reason that it is of no validity, and creates no enforceable right in favor of any one or liability on the part of the county. It is contended that a void pretense is no pretense; a void token, no token. That the certificate which was used as a token is without validity, in that it neither creates, nor purports to create, any liability against the county, is true. We so held in the case of *State v. Ryan* (decided at the present term) 9 N. D. 419, and for that reason it would not sustain a conviction for forgery. But there is a marked distinction in the test of an indictment for forgery and one for obtaining money by a false writing. A forged instrument must be one which, if genuine, would create some right or liability, or, in other words, be of some legal effect, while a false token need only be adapted to induce another to part with his property. The essence of the latter crime is the obtaining of the money or property of another by the aid of the false pretense. The pretense used to effect the fraud is not confined by the statute to written instruments of real or apparent legal effect, nor, in fact, to written instruments at all, but may be any false and fraudulent representations of past or existing facts which are adapted to induce persons to whom made to part with something of value. Again, it is urged that if the county officials had exercised common prudence, and acted within their legal authority, the defendant would not have obtained the money of the county. This must be conceded. Yet the fact that the defendant would have failed to get the money, if the county officers had done their duty under the law, does not alter the character of the acts which the defendant is charged with having committed, namely, of obtaining the county's money by aid of this false certificate. If he did in fact so obtain it, the crime charged was committed, without regard to the negligence of the county's agents. The doctrine of recent cases is that the fact that investigation and the exercise of ordinary prudence would have disclosed the falsity of the pretenses will not render them insufficient to support a conviction; and, more than that, it is not necessary that the pretense be sufficient to deceive a person of ordinary prudence, if in fact it deceived the person defrauded, and it is only such pretenses as are in themselves absurd and incredible that will not support a conviction; and, further, the question whether the false pretense was relied upon and was the inducement by which property was obtained is for the jury. *State v. Vanderbilt*, 27 N. J. L. 328; *People v. Hensler*, 48 Mich. 49, 11 N. W. Rep. 804; *Jenkins v. State*, 97 Ala. 66, 12 South. Rep. 110; *Thomas v. People*, 113 Ill. 531; *Com. v. Lee*, 149 Mass. 179, 21 N. E. Rep. 299; *State v. Knowlton*, 11 Wash. 512, 39 Pac. Rep. 966; *Bracey v. State*, 64 Miss. 17, 8 South. Rep. 163; *Watson v. People*, 87 N. Y. 561; McLean, Cr. Law, § 687. In *Woodbury v. State*, 69 Ala. 242, on this the court said: "Whether the prosecutor could have avoided imposition from the false pretense, if he had exercised ordinary prudence and discretion to detect its falsity, is not a ma-

terial inquiry. As a general rule, if the pretense is not of itself absurd or irrational or if he had not at the very time it was made and acted upon the means of detecting its falsehood, if he was really imposed on, his want of prudence is not a defense." Again, in *State v. Fooks*, 65 Ia. 196, 21 N. W. Rep. 561, the court, in passing upon the sufficiency of a false pretense under a similar statute, said: "The law will afford protection to the dull and stupid and confiding against the acts of a cheat. The wise and prudent are not alone protected. If the false pretenses were made with the design of deceiving, and thereby obtaining credit or property, and had that effect, the guilty party cannot escape on the ground of the weak credulity of his victim." See, also, *State v. Montgomery*, 56 Ia. 195, 9 N. W. Rep. 120. There are cases holding views contrary to the foregoing, among which may be cited *People v. Stetson*, 4 Barb. 156; *People v. Williams*, 4 Hill, 9, 40 Am. Dec. 258; *Com. v. Grady*, 13 Bush, 285, 26 Am. Rep. 192. But these cases are not generally accepted as authority at this time, and the prevailing and better rule, as it seems to us, is that above stated. It is also well settled that the crime of obtaining money by false pretenses may be committed against a municipal corporation by making the false representations to its officers, and thereby securing its funds. In *People v. Court*, 83 N. Y. 436, a false claim of indebtedness against the city of New York was the basis of the prosecution. It was urged by the defendant "that the pretenses proved against him were not of that character [that is, within the statute], for the reason that they consisted of a false claim of indebtedness due from the alleged debtor"; and it was said "that one who makes such claim to a debtor, who must be assumed to know that he does not owe the debt, cannot be said to have induced the payment by his unfounded demand." The court's answer was that "this may be true of the supposed case, and yet not be true of the one before us. The alleged debtor in this case is a municipal corporation. It can act only by and through its appointed officers and agents. It cannot be assumed that they necessarily know in every instance that a debt claimed to be due from the city was without foundation. Indeed, the very guards and precautions thrown around the audit and allowance of bills against the city, shown in the evidence in the case before us, indicate a consciousness of the danger of deceit and fraud. But, in any event, the question whether the false pretenses of Genet were calculated to deceive, and were capable of deceiving, was a question for the jury. * * * As a matter of fact, it did deceive. It did induce the audit and approval of the comptroller's office, and, in the face of that fact, it is impossible to say that the false bill was not calculated to deceive or incapable of defrauding." For other instances where the charge has been sustained when municipal corporations were the parties defrauded, see *Roberts v. People*, 9 Col. 458, 13 Pac. Rep. 630; *State v. Wilkerson*, 98 N. C. 606, 3 S. E. Rep. 683; *State v. Walton*, 114 N. C. 783, 18 S. E. Rep. 945; *State v. Crowley*, 39 N. J. L. 264. In *State v. Switzer*, 63 Vt.

604, 22 Atl. Rep. 724, 25 Am. St. Rep. 789, it was claimed, as here, that the false pretenses relied upon were not such as to mislead a man of ordinary prudence. The court said: "This question cannot be raised by demurrer; for, if the rule is as claimed by respondent's counsel, whether the pretenses were calculated to deceive a person of ordinary prudence would be a question to be submitted to the jury, under all the circumstances of the case."

The certificate used by this defendant to obtain money from the county treasury is founded on the resolution of the county board, and, while the county auditor is held, in theory, to know that the resolution offering the bounty was void for want of authority in the board to contract in reference to the general fund for the purpose, yet, practically, he did what such officers generally do. He assumed that the commissioners had authority to bind the county to pay the gopher bounty in the manner and form provided in their resolution, and that the certificate was legal proof of an actual indebtedness of the county. In light of these conditions, which are derived from the facts set out in the indictment, it cannot be said that the indictment shows upon its face that the alleged false token was so absurd and incredible that it was not adapted to deceive. It is alleged that it did deceive, and that question is for the jury. The indictment was not vulnerable on that ground.

The indictment is assailed on another ground. It is contended that inasmuch as it alleges that the false certificate was presented to, and delivered to, the county auditor by the defendant, and a warrant was received from that officer on the county treasurer, the indictment itself, by these allegations, shows that the defendant did not receive money by aid of the false pretenses as charged, but did receive property, to-wit, the warrant of the auditor directing the treasurer to pay the money, and for that reason the indictment must fall. If the foregoing contention is true, and the state were limited to prosecutions either for obtaining the warrant from the auditor or money from the treasurer as individuals, then the defendant would, indeed, be fortunate: for it is evident that a conviction for obtaining the warrant from the auditor by aid of the false certificate could not be sustained, for the reason that the warrant issued was void upon its face and without value, in that it showed upon its face that it was in payment of gopher bounties out of the general fund, and also lacked the signature of the chairman of the board of county commissioners. By obtaining it, he had defrauded no one, and had received nothing of value. On the other hand, it is clear that an indictment for obtaining the money from the treasurer by means of the auditor's warrant would not sustain a conviction, for the use of a false pretense would be lacking. Neither of these conditions confront us, however. A sufficient answer to the objection now under consideration is that the defendant is not charged with obtaining property from the county auditor, or money from the county treasurer, as individuals, but is charged with obtaining money from Sargent County, by aid of the false certificate in ques-

tion; and the allegations of the indictment that the certificate was presented to the auditor, that in reliance thereon the latter issued his warrant on the treasurer, and that the treasurer paid the money to the defendant in reliance on the warrant, merely embrace the steps by which the defendant fraudulently obtained the money from the county. The ultimate fact is the obtaining of the money from Sargent county. That is charged, and also the exact manner by which it was obtained. The relation of the county auditor and county treasurer, in reference to the disbursement of county funds, is intimate. They are the county's agents in that regard. To reach the funds of the county, they must act conjointly; the auditor issuing a warrant, properly signed and sealed, and the treasurer paying the money. But in doing this they do not act as individuals, but as the representatives of the county. The indictment then plainly shows that the defendant obtained the money from the county by means of a false representation made to its agent, the county auditor, and this brings it within the settled rule that "the fact that the false representation is made to an agent of the owner from whom the money or property is obtained will not prevent the punishment of the false pretense as made to him directly." McClain Cr. Law, § 683; 2 Bish. Cr. Law, § 472. "Obtaining from A.'s wife, on A.'s direction, supports an averment of obtaining from A." 2 Whart. Cr. Law (9th Ed.) § 1227. In *People v. Wakely*, 62 Mich. 297, 28 N. W. Rep. 871, the court held that "it was competent to allege in the information that the false representations were made to an agent, and, if he had authority to sell the article obtained by such false pretense, it will be sufficient, although the principal did not rely upon the representations made, otherwise than through the agent." So, in a Massachusetts case (*Com. v. Call*, 21 Pick. 515), involving the effect of false representations made to the agent of one Parker, the court said: "A false representation, made to the agent of Parker, and by him communicated to Parker, upon which he acted, was, in legal contemplation, a false representation made to Parker himself. It was designed to influence him, and, whether communicated to him directly or through the intervention of an agent, can make no difference. It was intended to reach and operate on his mind. It did reach it, and produced the desired effect upon it, viz: the payment of the money, and it is entirely immaterial whether it passed through a direct or circuitous channel. So, the payment by the agent of Parker, according to Parker's orders, out of money in the hands of the agent, was legally a payment by Parker of his own money, according to the allegations of the indictment." *Com. v. Harley*, 7 Metc. 462. So, too, it is competent to allege that the representations were made to an agent, and acted upon by an agent. *Jacobs v. State*, 31 Neb. 33, 47 N. W. Rep. 422. In the case at bar the false representation was made to the county auditor, who was the only person to whom it could be directly made. That, under the authorities, was a false representation to the county as an entity, and, when the county treasurer paid the money to the defendant upon

the warrant, it was paid clearly on reliance upon the alleged false pretense that the county was indebted to the defendant. The indictment sufficiently alleges that the county was defrauded of its money, that such money was obtained by means of a false pretense made to one of its officers, and, under the direction of the officer to whom the false pretense was made, payment was made to the defendant. That is all that is necessary. The indictment is not, therefore, open to the objection urged.

The order of the trial court overruling the motion for new trial is assigned as error. The motion was based upon alleged errors in the admission of testimony, and in the instructions, and upon the insufficiency of the evidence to sustain the verdict. The assignments of error, relative to both the admission of evidence and the instructions, upon which counsel for defendant rely chiefly in their brief, relate to the questions which we have determined in considering the sufficiency of the indictment. They therefore need not be referred to further. We have carefully examined the remaining assignments, and find that the rulings and instructions complained of are not of sufficient importance to require extended treatment, and that in them there is no prejudicial error.

One ground of the motion yet remains to be considered, namely, that there is no evidence to sustain the verdict. Counsel contends that the undisputed evidence shows that the certificate alleged to be a false certificate was in fact true and genuine, and therefore the conviction for obtaining money by aid of a false pretense cannot be upheld. We do not so understand the evidence. It is true it was not false in the sense that it was not written and signed by the township clerk. Both the clerk and the defendant testified to its execution, and both of them also testified that 2,250 gopher tails were presented by the defendant and counted by the clerk at the time of its issuance. The certificate was not issued in the defendant's name, but in the name of L. Lund. The latter was defendant's hired man upon his farm, and with the defendant daily. He testified that he presented no tails to the clerk, destroyed no gophers, and had no knowledge that the certificate had been issued in his name until about the time these frauds were being investigated, when the defendant requested him to state to the state's attorney that he (Lund) had presented the tails represented by the certificate. It appears also in the evidence that the defendant obtained from the same township clerk several other certificates showing that he had destroyed several thousand gophers besides those represented by the certificate in question, and that he secured the money from the county on them. Lund's evidence is to the effect that the defendant did not destroy to exceed a dozen gophers during the gopher season. It is shown also that this township clerk issued certificates in one month which, in the aggregate, afforded proof of the destruction of 50,000 gophers. The jury would have been amply justified in entirely discrediting the statement of the defendant and the clerk that 2,250 tails were presented and counted when the cer-

tificate was issued, but, aside from this, the evidence is overwhelming that the defendant did not destroy gophers to that number or at all. It was therefore a false certificate, and false proof of a supposed liability of the county. There would, in fact, have been no legal liability had the certificate been true. But the county officers, charged with the disbursement of the county's funds, had mistakenly, but honestly, assumed the validity of the resolution of the board of county commissioners, and had opened the vault of the county treasury for the payment of honest claims earned under such resolution. If the defendant had earned the offered bounty by the actual destruction of the gophers, and, in reliance upon the validity of the resolution, obtained payment from the county, although he would thus have obtained what was not his legally, yet he could not legally be convicted of obtaining money by aid of a false pretense; for the design and intent to defraud would be wholly wanting. But neither the county commissioners nor county auditor nor county treasurer ever intended or undertook to pay false or fictitious claims, or any other than those within the terms of this resolution, viz: claims for gophers actually killed. The defendant obtained money from the county upon a representation that he had killed a certain number of gophers, when in fact he had not done so, and this representation was made through the medium of the false certificate set out in the indictment. The verdict is amply supported by the evidence. The judgment of the District Court is affirmed. All concur.

(83 N. W. Rep. 869.)

STATE OF NORTH DAKOTA *vs.* ANDREW RYAN.

Opinion filed October 17, 1900.

Forgery—Indictment.

A written instrument, which shows upon its face that it neither creates nor purports to create any liability on the part of any one, is not the subject of forgery, unless extrinsic facts exist which give to it that character.

Void Instruments—Extrinsic Facts.

An indictment for forging an instrument, which upon its face does not purport to create any liability, must allege the extrinsic facts which are relied upon to give such instrument validity as creating an obligation.

Character of Instrument—Uttering and Publishing.

The defendant is charged with the crime of forgery committed by uttering and publishing as true a falsely made and forged instrument, knowing the same to be false and forged, the same being a written certificate purporting to be made by a township clerk, reciting that 1,000 gopher tails had been presented to him by one Stewart, and that he had destroyed them. *Held*, that said certificate does not on its face either create, or purport to create, any liability, or create any right by which any one may be affected, and, standing alone, is not the subject of forgery.

County Commissioners—Invalid Resolution.

The indictment sets out at length a resolution of the county commissioners offering a bounty, payable from the general county fund, for the destruction of gophers, and making provision for the payment thereof out of such fund upon the production of a certificate from a township clerk showing the facts of presentation, counting, and destruction. *Held*, that said resolution is entirely void, for the reason that it is not within the powers granted to county commissioners either by organic or statutory law to offer bounties from the general county fund. *Held*, further, that the pleading of such void resolution in the indictment does not give legal force and effect to the certificate of the township, which the defendant is accused of uttering, as creating or purporting to create any liability whereby any one may be affected.

Indictment Insufficient for Uttering.

The allegations of the indictment examined, and found insufficient to charge the offense of uttering a forged instrument, for the reason that it appears upon the face of the indictment, by the extrinsic facts pleaded, that the instrument alleged to have been uttered by the accused neither created, nor purported to create, any liability.

Appeal from District Court, Sargent County; *Lauder, J.*
Andrew Ryan was convicted of forgery, and appeals.
Reversed.

T. A. Curtis, E. W. Bowen, and Charles E. Wolfe, for Appellant.

The defendant is not charged with having made the instrument the basis of this accusation, but is charged simply with uttering an instrument which someone else had made, and which the indictment says was falsely made and forged, yet purported to be the act of the person whose name was signed thereto. The defendant could not be convicted in the absence of evidence showing that the instrument was not made by Harris, or if made by him was fraudulently and materially altered after it was made, and the defendant could not, from the language of this indictment, know which of these contingencies he was called upon to meet. The indictment in this regard is not sufficiently definite and certain. *Peo. v. Merriam*, 28 Mich. 255; *State v. Reibe*, 7 N. W. Rep. 140. No forgery can be predicated upon an instrument which is void on its face. 8 Am. & Eng. Enc. L. 461, 2 East's P. C. 953. Every one is presumed to know the law governing the instrument, which law enters into and forms a part of such instrument, and if the law will render the instrument void, the false making of such instrument is not forgery. *Johnson v. State*, 23 Wis. 504; *Peo. v. Sharrel*, 9 Cow. 778; *State v. Lytle*, 64 N. C. 255; *Peo. v. Harrison*, 8 Barb. 560; *Howell v. State*, 37 Tex. 591; *Peo. v. Mann*, 75 N. Y. 484; *Rood v. State*, 5 Neb. 475; *Peo. v. Galloway*, 17 Wend. 540; *Barnum v. State*, 15 O. 717. An indictment for forgery must show on its face that the instrument is one which, if genuine, would establish or defeat some claim, impose some duty, create some liability, or work some prejudice to another in his rights. *Peo. v. Tomlinson*, 35 Cal. 503; *Barnum v. State*, 15 O. 717; *Territory v. DeLena*, 41 Pac. Rep. 618; *Waterman v. People*, 67 Ill. 91. The indictment for forgery must

set forth an instrument which, on being described, on its face appears to be naturally calculated to have some legal effect, also extrinsic facts must be offered showing such legal effect. *State v. Cook*, 57 Ind. 574; *State v. Wheeler*, 19 Minn. 98; *State v. Briggs*, 34 Vt. 501; *Rollins v. State*, 22 Tex. App. 521; *Murry v. State*, 50 S. W. Rep. 521; *Hendricks v. State*, 26 Tex. App. 176. The commissioners had no authority to pass the resolution set forth in the indictment. The same is contrary to express law and void. §§ 1974 and 1899, Rev. Codes. The certificates of officers not authorized or required by law have no more force or effect than the certificate of a private person. *Smith v. Lawrence*, 2 S. D. 202; *Downing v. Brown*, 3 Colo. 590; *Wood v. Nissen*, 2 N. D. 26; *Goose River Bank v. Gillmore*, 3 N. D. 188. The forgery of a certificate imposing no duty or conferring no right is no offense. *Rembert v. State*, 53 Ala. 467. There must be both the intention and the power to defraud or the offense is not committed. *Dixon v. State*, 81 Ala. 61, 1 So. Rep. 69; *Williams v. State*, 8 So. Rep. 825; *Territory v. DeLena*, 41 Pac. Rep. 618; *Raymond v. Peo.* 30 Pac. Rep. 504; *Merkel v. Berks County*, 81 Pa. St. 505; *State v. Brett*, 40 Pac. Rep. 873. The prosecution failed to prove the resolution set forth in the indictment, as laid, and the variance is fatal. *Hazlitt v. State*, 7 N. W. Rep. 115; *State v. Fallon*, 2 N. D. 510; *Sharley v. State*, 54 Ind. 188; *Sutton v. State*, 79 N. W. Rep. 154; *Robinson v. State*, 43 S. W. Rep. 526. The judgment should be reversed and the defendant discharged because no prosecution can be founded upon this certificate. *Waterman v. Peo.* 67 Ill. 91; *State v. Wilson*, 28 Minn. 52.

P. H. Rourke, S. M. Lockerby, and J. E. Bishop, for respondent.

A variance between the indictment and proof is not material unless it is such as might expose the defendant to the danger of being put twice in jeopardy for the same offense. *Abbott's Tr. Bf.* 411; *Harris v. People*, 64 N. Y. 148; *Rice on. Crim. Ev.* 170. To be the subject of forgery it is not necessary that the instrument should have actual, legal efficacy. It is sufficient that, if genuine, it may have such apparent efficacy, that although its invalidity may be established by extrinsic facts, nevertheless, it may be capable of effecting a fraud and therefore be a subject of forgery. *State v. Van Auken*, 68 N. W. Rep. 457; *State v. Johnson*, 96 Am. Dec. 158, 13 Am. & Eng. Enc. L. (2d Ed.) p. 1093; *Rembert v. State*, 25 Am. Rep. 693; *State v. Vineyard*, 40 Pac. Rep. 173. An instrument valid on its face may be the subject of felonious uttering, although collateral facts may exist that would render it absolutely void if genuine. *Peo. v. Rathburne*, 21 Wend. 509; *Peo. v. Galloway*, 17 Wend. 540; *State v. Johnson*, 96 Am. Dec. 158; *State v. Hilton*, 35 Kan. 330. An instrument void as being against public policy or *ultra vires* may be subject to forgery. *People v. Monroc*, 35 Pac. Rep. 326; *People v. James*, 110 Cal. 155.

YOUNG, J. The defendant was convicted of the crime of forgery

in the fourth degree, and sentenced to confinement in the penitentiary for a period of one year. The only question which we need to consider is the sufficiency of the indictment on which the defendant was tried and convicted. Counsel for defendant attacked it in the trial court on the ground that "it does not state facts sufficient to constitute a public offense," and urges the same objection on this appeal as one of several grounds for asking a reversal. The indictment is as follows: "The Grand Jury of the State of North Dakota, in and for the County of Sargent, upon their oaths present that heretofore, to-wit, on the fifteenth day of June, in the year of our Lord one thousand eight hundred and ninety-nine, at the County of Sargent, in the State of North Dakota, one Andrew Ryan, late of said County of Sargent, and said County of Sargent and state aforesaid, did commit the crime of uttering and publishing as true a falsely made and forged instrument, knowing such instrument to be falsely made and forged, committed as follows: That heretofore, and before the commission of the offense hereinafter mentioned, to-wit, on the thirteenth day of March, in the year A. D. 1899, the County of Sargent was, and still is, one of the duly organized and existing counties in and of the State of North Dakota. That at the village of Forman, the county seat of said Sargent County, on the thirteenth day of March, aforesaid, the duly elected, qualified, and acting board of county commissioners of said Sargent county, in legal meeting assembled, passed, adopted, and published a resolution in the following words and figures, that is to say: 'Be it resolved, that the County of Sargent allow and offer a gopher bounty for the year 1899 for each gopher killed between the first day of April and the first day of July, 1899; that said bounty shall be two (2) cents for each gopher killed, the same to be paid out of the general county fund upon the warrant of the county auditor, provided that the county auditor shall issue such warrant upon the certificate of the township clerk of each township wherein such gophers are killed; that said town clerk certify to the number of tails of such gophers killed which were presented to and destroyed by such town clerk. Dated at Forman, this thirteenth day of March, A. D. 1899.' That such resolution has never been repealed or rescinded. That at all the times in said resolution mentioned, to-wit, between the first day of April and the first day of July, A. D. 1899, both days inclusive, one George A. Harris was the duly elected, qualified, and acting township clerk of the township of Vivian, one of the duly organized and existing civil townships of the County of Sargent, aforesaid. And the grand jurors aforesaid, upon their oaths as aforesaid, do further present that the said Andrew Ryan, at the time and place aforesaid, to-wit, on the fifteenth day of June, in the year A. D. 1899, at the County of Sargent and state aforesaid, and within the jurisdiction of this court, feloniously did utter and publish as true a certain false made and forged instrument, knowing such instrument to be falsely made and forged, purporting to be an official certificate issued by the said George A. Harris, town-

ship clerk of the township aforesaid, to the effect that one J. A. Stewart had presented to said George A. Harris, township clerk of the township of Vivian aforesaid, one thousand (1,000) gopher tails, and purporting to be issued by the said George A. Harris, township clerk of the said Vivian township aforesaid, which said falsely made and forged certificate is in the words and figures, that is to say: 'Sargent County, North Dakota. Office of the Town Clerk of Vivian Township. To W. S. Baker, County Auditor: This is to certify that J. A. Stewart has presented to me one thousand (1,000) gopher tails, which have been destroyed by me this day. Dated at Vivian, this twelfth day of June, 1899. George A. Harris, Township Clerk.' That after, and on the fifteenth day of June, 1899, at the county and state aforesaid, said falsely made and forged certificate was by the said Andrew Ryan, then and there knowing such instrument to be falsely made and forged, presented to the said W. S. Baker, county auditor as aforesaid, of Sargent County aforesaid, for payment, with intent to defraud said Sargent County; this contrary to the form of the statute," etc.

The indictment is founded on § 7438 and subdivision 2 of § 7430 of the Revised Codes, which read:

"§ 7438. Every person who, with intent to defraud, utters or publishes as true, any forged, altered or counterfeited instrument, or any counterfeit gold or silver coin, the forging, altering or counterfeiting of which is hereinbefore declared to be punishable, knowing such instrument or coin to be forged, altered or counterfeited, is guilty of forgery in the same degree as if he had forged, altered or counterfeited the instrument or coin so uttered, except as in the next section specified."

"§ 7430. Every person who, with intent to defraud, falsely makes, alters, forges or counterfeits: * * * (2) Any instrument or writing, being or purporting to be the act of another, by which any pecuniary demand or obligation is, or purports to be created, increased, discharged or diminished, or by which any rights or property whatever, are or purport to be transferred, conveyed, discharged, diminished or in any manner affected, the punishment of which is not hereinbefore prescribed, by which false making, altering, forging or counterfeiting, any person may be affected, bound or in any way injured in his person or property, is guilty of forgery in the third degree."

§ 7439 reduces the offense to the fourth degree when it appears that the instrument uttered was innocently received by the accused for a good and valuable consideration, and without any circumstances to justify a suspicion of its being forged or counterfeited.

The jury found that the facts brought the defendant within the foregoing sections, and accordingly returned a verdict of forgery in the fourth degree.

Counsel for defendant broadly contend that the written certificate set out in the indictment as the basis of this prosecution is not such an instrument as can be made the subject of forgery, and conse-

quently that its utterance by the defendant cannot subject him to the penalties provided for those who utter forged instruments. It certainly requires no argument to show that if counsel's first proposition is correct, namely, that a conviction for forgery of the certificate could not be sustained, likewise a conviction for uttering it could not be upheld; for it is entirely obvious that prosecutions under §§ 7438, 7439, *supra*, are limited to the utterance of instruments which are the subject of forgery,—that is, to forged instruments.

It is obvious, too, on inspection, that the certificate in question, standing alone, is not a subject of forgery. It was not made pursuant to statutory authority or express law. Further, and with particular reference to § 7430, *supra*, under which the indictment is drawn, we may say that on its face and by its language it neither purports to nor actually increases, discharges, or diminishes any pecuniary demand or obligation, neither does it purport to transfer, convey, discharge, or diminish any rights or property or affect them in any manner to the prejudice of any person. It merely recites that the maker of the certificate has received 1,000 gopher tails from J. A. Stewart, and has destroyed them. There is absolutely nothing on the face of the certificate to indicate that, as a consequence of the existence of the facts so certified, any rights accrue to any one, or that any person or municipality incurs any liability by reason thereof. Standing alone, on the strength of its own recitals, it would not support a prosecution for forgery; for, as a genuine writing, it neither creates, nor purports to create, any liability. This is properly conceded by counsel for the state. It is contended, however, on the part of the prosecution, that while, as a general rule, an instrument invalid on its face is not the subject of forgery, because such an instrument has not the legal capacity to effect fraud, yet that an instrument which does not appear to have any validity upon its face may be shown to have validity by extrinsic facts, and so become the subject of forgery, and that an indictment describing such an instrument, and alleging sufficient extraneous facts to establish its validity as an instrument creating or purporting to create an obligation or liability, will be sustained. This contention, we think, correctly states the law, and it is supported by the authorities. In *State v. Wheeler*, 19 Minn. 98, the court said: "As an instrument, to be the subject of an indictment for forgery, must either appear on its face to be, or be in fact, one which, if true, would possess some legal validity (2 Bish. Cr. Law, §503), so, if it does not so appear on the face of the instrument set out in the indictment, facts must be averred which will enable the court to see that, if it were genuine, it would possess such validity." See, also, *People v. Shall*, 9 Cow. 778; *People v. Harrison*, 8 Barb. 560; *State v. Briggs*, 34 Vt. 501.

Counsel for the state contend that, by pleading the resolution passed by the county commissioners authorizing the payment of a bounty for the destruction of gophers, and providing for payment

out of the county general fund upon the production to the county auditor of a certificate like that here in question, validity is given to the certificate, so as to make it the basis of a legal demand against the county. If this contention is true, if the certificate, when considered in connection with the resolution of the county commissioners, either creates, or purports to create, a liability on the part of the county, then it must be conceded that the instrument is subject to forgery. A similar certificate was in question in *State v. Johnson*, 26 Ia. 407, 96 Am. Dec. 158. In that case the court said: "It is an instrument which, if genuine by the legitimate action of the proper authorities, would be received, and, according to the averments of the indictment, was to be received, as legal proof of a liability." The case just referred to is in point only to the extent of showing that such an instrument as that here in question may be the subject of a prosecution for forgery when supported by averments of sufficient extrinsic facts as to give it validity, and goes no further. It is carefully pointed out in the opinion that the legislature of that state had granted the supervisors the power to offer bounties, and had designated certain officers to make certificates like that here in question. That court further said: "From this legislation, and looking to the language of the indictment, it seems that the board had the power to and did undertake to pay 15 cents on each gopher scalp produced and properly destroyed. It is also clear, and not denied, that this justice, Burns, had the power to efface and destroy such scalps. He had the power, as such officer, by the terms of the statute, and the indictment charges in express words that he was authorized thereto by the board, and also to issue his certificate of such counting and destruction; said certificate being received and taken by the board as legal proof of such counting for the purpose of issuing warrants," etc. The conclusion reached by the court in the above case, that the certificate was subject to forgery, rested upon two grounds: First, that the certificate was issued under authority of law; second, that had it been genuine it would have afforded legal proof of a liability on the part of the county. In the case at bar, however, counsel for defendant challenge the validity of the resolution of the county commissioners, which is set out at length in the indictment for the purpose of giving validity to the certificate. It is their contention that the resolution on its face not only fails to give any legal effect to certificates issued by township clerks pursuant thereto, but shows affirmatively that such certificate, and the resolution itself, are entirely void. To this view we are compelled to yield assent. It is well settled that counties cannot enter into contracts which are not expressly or impliedly authorized by statute or organic law, and that agreements entered into in excess of such authority are void. Further, that the authority of county commissioners must be found in the statute in express words or by fair implication. *Lebcher v. Board*, 9 Mont. 315, 23 Pac. Rep. 713; *Hawk v. Marion County*, 48 Ia. 472; *Edwards County v. Jennings*, (Tex. Civ. App.) 33 S. W. Rep. 585, 1 Dill. Mun. Corp. § 25. In

Lebcher v. Board, supra, it was said: "An individual may contract as to lawful subjects as he pleases. Municipal corporations or public officers are bound by the law. They are authorized by the law of their creation to make certain contracts. They are creatures of the law, and not of nature. They have not natural rights, but only rights given by law. Their contracts obtain validity only by force of the law authorizing their making. It follows that, if they make contracts that the law does not empower them to enter into, there is no authority for such contract, nothing for it to stand upon, and it falls of its own weight. It is void. * * * Persons contracting with such artificial creations of the law, as municipal corporations and public officers, are charged with notice of the character and constitution of the entity with which they deal. They know the law, and know what are valid acts of such artificial persons. They contract at their peril." See the authorities cited in the opinion. There is no statute in this state authorizing county commissioners to contract for the payment of bounties for the destruction of gophers out of the county general fund, or to incur a general indebtedness against the county for such purposes. The resolution, then, is not merely irregular, but is void upon its face.

Specific authority has been given by the legislature to county commissioners to create a "gopher destruction fund" from taxes derived exclusively from a tax upon real estate. This fund, when brought into existence, is subject to their control. This is found in § 1322, Rev. Codes, which reads: "The board of county commissioners of any county in this state may, at any time fixed by law for the levy and assessment of taxes, levy a tax of not exceeding two mills on the dollar of the assessed valuation, upon all real estate in such county, the proceeds of which shall be used solely for the purpose of promoting the destruction of gophers in such county. The fund provided to be raised in accordance with this section shall be denominated the 'Gopher Destruction Fund,' and shall be kept separate and distinct by the county treasurer, and shall be expended by and under the direction and control of the board of county commissioners at such time, and in such manner, as is by such board deemed best to secure the abatement and extinction of the gopher pest." It was within the power of the board to proceed under the foregoing section, and to levy a tax upon the real estate of their county at the time and within the limit provided by said section. Had this been done, there would have been a fund in reference to which they were authorized to contract for the payment of bounties, and it would then have been within their power to determine that certificates like that in question should be received as legal proof of the liability of such fund. Had that been done here, as in the Iowa case, the certificate in question would have been a subject of forgery. But in fact no tax was levied upon the real estate of the county, or at all, which is clearly a condition precedent to the existence of any authority under said section. On the contrary, the resolution shows upon its face that they were attempting to pay the bounty out of the gen-

eral county fund derived from taxes levied upon all classes of property. Not only is the resolution void, for the reason that in its very language it attempts an unlawful diversion of county funds, but the means provided for extracting the funds from the county treasury are in violation of express statutory provisions. Following the direction of the resolution,—and that appears in the evidence to have been done in this case,—the county auditor would, upon the presentation of one of these certificates, issue a warrant upon the general county fund, and the county treasurer would pay it. The lawmaking power of the state has not seen fit to grant to county commissioners unrestricted authority as to county funds. On the contrary, the manner of disbursement has been the subject of express legislation. § 1899, Rev. Codes, provides, among other things, that “all orders made by the board, and all warrants drawn on the county treasurer, except warrants for salaries of county officers, shall be signed by the chairman of the board and attested by the auditor.” This requirement is again repeated in § 1919, which further requires that the county seal shall be affixed, and that it shall designate the fund upon which it is drawn. See, also, § 1963. These sections are not modified, in our opinion, by § 1974, which requires the county auditor to issue warrants. The fact that he may issue them does not give them validity, where there is also the additional requirement that the chairman of the board of county commissioners shall sign them. We are entirely clear that the resolution was void on its face, and accordingly imparted no validity, real or apparent, to the certificate of the township clerk made in pursuance thereof. Had the certificate set out in the indictment been genuine in every particular, it would not have afforded legal proof of a liability on the part of the county or have purported to have done so. A forged certificate would have been of as much legal efficacy as a genuine one. Neither in fact could, under the law, create any liability whatever. With the moral aspect of defendant's acts we have nothing to do. Our duty is restricted to determining the sufficiency of the indictment. Having reached the conclusion that the certificate which defendant is charged with uttering is not the subject of forgery, it follows that the judgment of conviction must be reversed; and it is so ordered. All concur.

(83 N. W. Rep. 865.)

WILLIS A. JOY, AS ADMINISTRATOR, *vs.* JAMES ELTON, *et al.*

Opinion filed October 16, 1900.

Executor's Bond—Final Accounting of Executor—Judgment.

This action is brought upon an executor's bond filed by the defendant Stillman W. McLaughlin in the County Court of Grand Forks county in connection with ancillary letters testamentary issued by said court to said McLaughlin; McLaughlin having previously received original letters testamentary in a foreign state, in which the deceased was domiciled at death. The suit is brought to recover a balance claimed to be due the estate from said McLaughlin as executor. The only evidence of any such balance was a certain judgment entered by the County Court of Grand Forks county upon an accounting made in said court by the executor. *Held*, that a judgment entered by the County Courts of this state upon the final accounting of an executor is of equal rank with judgments entered in other courts of record in this state, and is conclusive as against collateral attack, except upon jurisdictional grounds and those of collusion and fraud.

Judgment Against Executor—Collateral Attack.

Such judgment is conclusive as against the bondsmen as well as the executor, and, as against the bondsmen, imports verity, and is not merely prima facie evidence of its contents. Such judgment is not a judgment against mere indemnitors, within the meaning of chapter 69 of the Civil Code; and hence the fact that the bondsmen were not present, and were not made parties to the accounting, does not invalidate the judgment as against the bondsmen. *Held*, upon the facts set out in the opinion, that the judgment sued on in this case is conclusive against the executor and his bondsmen, and that the same is not vulnerable to collateral attack upon jurisdictional grounds. *Held*, further, that the trial court erred in directing a verdict for the defendants; also,

Executor and Trustee Under Law.

Held, that where the same person is named in a will both as executor and as trustee, and is by the terms of the will required to execute certain trusts created by the will, the two capacities—those of executor and trustee—are distinct and independent of each other.

Liability of Executor—Accounting—Discharge.

Held, further, that such an executor, after taking possession of assets belonging to the estate as executor, cannot relieve himself and his bondsmen, with respect to such assets, by his own mere mental operations, and thereby cross the line dividing the two capacities. To be discharged from his liability as an executor, he must take some affirmative action of a character which is open and notorious, such as would be an accounting in the court from which he received his letters as executor, and a discharge as executor.

Appeal from District Court, Grand Forks County; *Fisk, J.*

Action by Willis A. Joy as administrator of the estate of Catherine L. Wording, deceased, against James Elton and Stillman W. McLaughlin as executors of the estate of Catherine L. Wording, and others. From a judgment in favor of defendants, plaintiff appeals.

Reversed.

Bosard & Bosard, for appellant.

If the same person is named as executor and also as trustee under a will, he may accept the one and decline the other. If he qualifies as executor and declines as trustee he will be chargeable as executor until the property is properly turned over to a qualified trustee. Gary's Probate Law, 741. An executor cannot convert himself into a trustee by a mere mental operation without an overt act. *Herrick & Doxsee on Probate Law*, 73; *Hall v. Cushing*, 9 Pick. 395; *Prior v. Talbot*, 10 Cush. 1; *Conkey v. Dickinson*, 13 Metc. 54; *Newcomb v. Williams*, 9 Metc. 525; *Dorr v. Wainwright*, 13 Pick. 328; *Towne v. Amidon*, 20 Pick. 535; *Miller v. Congden*, 14 Gray, 114; *White v. Ditson*, 140 Mass. 351, 4 N. E. Rep. 606, 54 Am. Rep. 473. Where the law gave to him two characters, those of executor and trustee, and the duties of the latter character were entirely distinct from, and independent of those of the former; where the same person is executor and trustee he must give a bond in his character as trustee before he can exonerate himself from his liability as executor. *Dagget v. White*, 128 Mass. 398; *Groton v. Ruggles*, 17 Me. 137; *Williams v. Cushing*, 34 Me. 370. Where one person is appointed by law as executor and trustee and fails to give bonds and to qualify as trustee, and a trustee is subsequently appointed he can recover the property in a suit on the executor's bond. *Briggs Exr. v. Baptist Church*, 8 Atl. Rep. 257; *In re Higgins Estate*, 28 L. R. A. 116, 39 Pac. Rep. 507; *Ryan v. Kinney*, 2 Mont. 454; *Bellinger v. Thompson*, 37 Pac. Rep. 744; *Wilson v. Wilson*, 17 Ohio St. 150, 91 Am. Dec. 125. Executors cannot discharge themselves of their official responsibility without doing some act to change the character of their holding and place the fund safely where it ought to be. *Cranston v. Wilsey*, 39 N. W. Rep. 9; *Newport v. Hazard*, 13 R. I. 1; *Scituate v. Angel*, 14 R. I. 495; *State v. Branch*, 134 Mo. 592; 56 Am. State Rep. 533. The sureties recognized the jurisdiction of the County Court in giving the bond so that McLaughlin could get letters testamentary, and they cannot question the jurisdiction of the court in this action, but are liable for his default. §§ 6185, 6186, Rev. Codes; *Green v. Wardwell*, 17 Ill. 278; *Pco. v. Norton*, 9 N. Y. 176; *Kelly v. State*, 25 Ohio St. 567; *Custer v. Albien*, 64 N. W. Rep. 533; *Lees v. Wetmore*, 12 N. W. Rep. 241; *Murphy v. Creighton*, 45 Ia. 175; *Shoenberger's Estate*, 20 Atl. Rep. 1050; *Fisher v. Bassett*, 3 Am. Dec. 228; *Deegan v. Deegan*, 22 Nev. 185, 50 Am. State Rep. 742, Black on Judg. 271, Van Fleet on Coll. Att. § 841. The defendants cannot raise the objection that the court did not have jurisdiction to make the order. It is conclusive against the executor himself and the sureties on his bond. *Bodrip v. Bodrip*, 56 Cal. 563; *Holland v. State*, 48 Ind. 391; *Gorton v. Botts*, 73 Mo. 276; *State v. Slaughter*, 80 Ind. 597; *Wolfe v. Shaffer*, 74 Mo. 154; *Slagle v. Entrekkin*, 44 Ohio St. 637; *Braden v. Mercer*, 44 Ohio St. 338; *Moulding v. Wilharte*, 46 N. E. Rep. 189; *Meyer v. Barth*, 72 N. W. Rep. 748.

Corbet & Murphy, Templeton & Rex, for respondents.

The jurisdiction had and exercised by the County Court of Ra-

cine, Wisconsin, was exclusive so far as relates to the matters attempted to be passed on by the County Court of Grand Forks county by the order here attacked. The property constituting this estate consisted of notes and cash, it could have not situs independent of the domicile of the owner. *Cleveland, Etc., Ry. Co. v. Pennsylvania*, 15 Wall. 300, 21 L. Ed. 179; *Cooper v. Beares*, 143 Ill. 25; *Parsons v. Lyman*, 20 N. Y. 103; *In re Butler*, 38 N. Y. 397; *Putnam v. Pitney*, 45 Minn. 242; *Broughton v. Bradley*, 73 Am. Dec. 480; *Cutts v. Hoskins*, 9 Mass. 543; *Christy v. Vest*, 36 Ia. 285. As executor of this will McLaughlin became at once invested with the title to all the personal property belonging to Wording at the time of her death. *In re Butler*, 38 N. Y. 397. The Wisconsin court by admitting this will to probate did the only thing necessary to vest and confirm in McLaughlin title to and power of disposition over this property. *In re Butler*, 38 N. Y. 397. The Wisconsin court has acquired jurisdiction, and that jurisdiction is exclusive and extends to the matter of accounting for personal property assets. *Parsons v. Lyman*, 20 N. Y. 103, Story's Conflict of Laws (8 Ed.) § 518; *Fletcher v. Sanders*, 32 Am. Dec. 96. The executor must account, at the domicile, for assets actually received by him in a foreign jurisdiction. *In re Ortiz*, 86 Cal. 306, 21 Am. St. Rep. 44; *Fox v. Tay*, 24 Pac. Rep. 855. An ancillary administrator can have no control over assets which are not subject to the law, under which he was appointed, and his surety will be liable only for his faithful administration of such assets as he had a right to receive. *Fletcher v. Sanders*, 32 Am. Dec. 96, *Baldwin's Appeal*, 81 Pa. St. 441; *McCord v. Thompson*, 92 Ind. 565. The liability of a surety on an executor's bond is not more extended. *Fletcher v. Sanders*, 32 Am. Dec. 96. Respondents are not estopped to deny the jurisdiction of the County Court. *Douglas v. Ferris*, 138 N. Y. 192; *Nevitt v. Woodburn*, 160 Ill. 203. The word jurisdiction in this connection means the power of the court to render the particular judgment entered in the particular case. *Pco. v. Tweed*, 60 N. Y. 559; *Ex parte Page*, 49 Mo. 291; *Coe Brass Company v. Savlik*, 93 Fed. Rep. 519; *Belford v. Woodward*, 41 N. E. Rep. 1097. It was not within the power of the County Court to bring the assets of this estate in controversy within its jurisdiction. The fact that these assets were within the jurisdiction of the Wisconsin court appeared upon the records of the Grand Forks County Court. This personality, which had its situs in Wisconsin, was beyond the jurisdiction of the Grand Forks County Court. *Pco. v. Seelye*, 146 Ill. 149; *Probate Court v. Hazard*, 13 R. I. 3. It is contrary to natural justice that the sureties on this bond should be estopped by a decree to which they were not parties, and of which they had no notice. *Lipscomb v. Postell*, 77 Am. Dec. 651; *Gibson v. Robinson*, 90 Ga. 756; *Bird v. Mitchell*, 28 S. E. Rep. 674; *Moore v. Alexander*, 1 S. E. Rep. 536; *Tierney v. Phoenix Insurance Company*, 4 N. D. 565. The will directed that the legacies and bequests should not be paid, but that the entire estate should be allowed to accumulate until the

principal and accrued interest of mortgages and investments should be sufficient to pay all legacies and bequests. This constituted McLaughlin trustee. The duties of trustee were superadded to those of executor. *Tracy v. Murray*, 49 Mich. 35; *Dunning v. Bank*, 61 N. Y. 497; *Greenland v. Waddell*, 116 N. Y. 234; *Ward v. Ward*, 105 N. Y. 68; *Hamm v. Hamm*, 58 N. H. 70; *Palmer v. Noyes*, 48 N. H. 174; *In re Besley*, 18 Wis. 484; *Allen v. Kennedy*, 8 S. W. Rep. 882; *Givens v. Flannery*, 49 S. W. Rep. 182. Respondents are not liable for the several defaults of McLaughlin as trustee. § 4651 Rev. Codes; *Wocner Administration*, § 260; *Hinds v. Hinds*, 85 Ind. 312. A trusteeship is none the less such although the word trustee may not appear in the instrument creating it. *Packard v. Old Colony Railway Company*, 168 Mass. 92. In making the specific instruments McLaughlin acted as trustee and not as executor. *Tracy v. Murray*, 49 Mich. 55; *Tobias v. Ketchum*, 32 N. Y. 319; *Robert v. Corning*, 89 N. Y. 226; *Simpson v. Cook*, 24 Minn. 180; *Ross v. Barclay*, 18 Pa. St. 179; *Hodgin v. Toller*, 30 N. W. Rep. 1, 70 Ia. 21; *Naundorf v. Schurman*, 41 N. J. Eq. 14, 2 Atl. Rep. 602; *Lanning v. Sisters*, 35 N. J. Eq. 392; *Clark v. Tainter*, 7 Cush. 567; *Levitt v. Wooster*, 14 N. H. 550; *Givens v. Flannery*, 49 S. W. Rep. 182; *Allen v. Kennedy*, 8 S. W. Rep. 882. This plaintiff, as administrator de bonis non, the successor of McLaughlin, has the same power over this estate that McLaughlin as executor had, but plaintiff has no authority touching this trust as he did not succeed to any power or authority over this trust fund, it follows that McLaughlin as executor possessed none. *Ross v. Barclay*, 18 Pa. St. 179; *Dunning v. Bank*, 61 N. Y. 497; *Lanning v. Sisters*, 35 N. J. Eq. 392; *Greenland v. Waddell*, 116 N. Y. 234; *Clark v. Tainter*, 7 Cush. 567; *Hodgin v. Toller*, 30 N. W. Rep. 1. The time within which McLaughlin could legally act as executor under the will expired prior to the time of making the investments under consideration. § 3849 Wisconsin Statutes. The payments of the legacies was a duty imposed upon him as trustee and not as executor. *Calkins v. Smith*, 41 Mich. 409; *Allen v. Kennedy*, 8 S. W. Rep. 882. The presumption of law is that the executor settled up the estate within two years. *Ingram v. Ingram*, 4 Jones Law, 188; *Carroll v. Bosley*, 27 Am. Dec. 460. Where the same person is both executor and testamentary trustee, after the expiration of the statutory period, it is conclusively presumed that the property is held in the capacity of trustee. *Wier v. Pco.*, 78 Ill. 192; *Bell v. Evans*, 94 Ill. 230; *State v. Hearst*, 12 Mo. 365; *Carroll v. Bosley*, 27 Am. Dec. 460; *Jacobs v. Bull*, 26 Am. Dec. 72; *Able v. Brady*, 28 Atl. Rep. 817; *Wooley v. Price*, 37 Atl. Rep. 644; *Allen v. Kennedy*, 8 S. W. Rep. 882; *Givens v. Flannery*, 49 S. W. Rep. 182. Where the same person is executor and testamentary trustee he will be held to hold the trust estate in his capacity as trustee, whenever and as soon as he manifests such intention by any authoritative act. *Wilson v. Wilson*, 17 Ohio St. 150; *Cluff v. Day*, 124 N. Y. 195; *Cranston v. Wilsey*, 39 N. W. Rep. 9; *Tittman v. Greene*, 18 S. W. Rep. 885; *Babb v. Ellis*, 76 Mo. 459.

WALLIN, J. This action is brought against Stillman W. McLaughlin and his bondsmen to recover an alleged balance in the hands of said McLaughlin as executor of the last will of Catherine L. Wording, deceased. The action was tried to a jury, and at the close of the testimony the trial court, on motion of the defendants' counsel, directed the jury to return a verdict in favor of the defendants. Such verdict was returned, and judgment was entered thereon dismissing the action. Plaintiff appeals to this court from such judgment.

A decision of the case will involve a consideration of the following facts, which appear of record: The last will and testament of Catherine L. Wording appointed said McLaughlin sole executor. The deceased at the time of her death was domiciled in the county of Racine and State of Wisconsin. The will was probated in the County Court of Racine County, and letters testamentary were issued to McLaughlin by said court on the 16th day of May, 1890; and upon an authenticated copy of said will, and the order of said County Court of Racine County admitting the same to probate, said will was admitted to probate in the County Court of Grand Forks County, North Dakota, on the 21st day of May, 1890. On the 21st day of July, 1890, said McLaughlin delivered to the County Court of Grand Forks County his bond as executor, which is the bond in suit. Said bond was in due form, and was signed by the other defendants as sureties, and by McLaughlin as principal. On the same day said County Court of Grand Forks County issued ancillary letters testamentary to said McLaughlin as executor under said will. It further appears that on the 27th day of December, 1897, said McLaughlin filed his written resignation with said County Court for Grand Forks County, and that said resignation was subsequently, and on April 19, 1898, accepted by said court, and said McLaughlin was then and there, by an order of said court, discharged as such executor. On the day said resignation was filed by said McLaughlin, and pursuant to a previous order made by said court in Grand Forks County, said executor filed his final account of his proceedings as executor, whereupon such proceedings were had in said court upon said account that said court entered its order and decree declaring in substance that said executor, as such, then had in his hands a balance of the assets of the estate of the deceased, in the sum of \$8,407.91. On the same day (April 19, 1898) said court in Grand Forks County entered an order making an allowance of a certain amount as commissions and fees to said executor, to be paid out of said balance in his hands, on condition, nevertheless, that said balance, after deducting said fees and commissions, should be paid into said court by said executor within a period of fifteen days from the date of said final order and decree. None of the said orders or decrees made on the 19th day of April, 1898, was appealed from, nor have the same been judicially vacated or set aside in any manner. Upon the hearing of said final account of said executor in the County Court for Grand Forks County, as before stated, the said executor

and all the legatees under the will, and the County Court of Racine County, Wisconsin, were represented by their attorneys, respectively. Said final order and decree contains the following recital: "Upon a full hearing of said account, and by the consent of all parties present, it is ordered, adjudged, and decreed that said account be stated as follows:" Then follows a statement of the account, showing items of debit and credit, and also a balance of said estate in the hands of the executor in the amount above stated, but subject to a conditional reduction by an allowance of the sum stated as for fees and commissions as already explained. The action is brought to recover the balance of \$8,407.91 as found by the County Court of Grand Forks County at said accounting. Plaintiff offered evidence tending to show, and the fact is not disputed, that no part of the balance so found has ever been paid by said executor, either into the County Court of Grand Forks County, or to the plaintiff in this action, or at all. All of the matters of fact as above narrated are substantially admitted by the answer, and are not controverted by the defendants, except that defendants allege that the allowance made in said final decree for services rendered by the executor was an absolute allowance, and was not made conditionally.

Defendants admit that plaintiff is administrator de bonis non of said estate, and allege that letters were issued to plaintiff as such by said court in Racine county, Wisconsin, on July 8, 1898, and allege that the said County Court of Grand Forks County did, in due form, make its order appointing plaintiff administrator of said estate, and issued letters of administration with the will annexed to plaintiff on or about October 11, 1898. Defendants allege in substance in their answer that said testatrix was domiciled in Racine County, Wisconsin, at the time of her death, and that under the laws of that state the County Court of Racine County aforesaid had full and exclusive jurisdiction in the matter of said estate over all the personal property belonging to said estate, wherever situated, and over all the real estate belonging to said estate, and situated in the state of Wisconsin; that after said will was probated in the County Court of said county of Racine, and before letters testamentary were issued by said court to McLaughlin as before stated, said McLaughlin filed a bond in said court in the penal sum of \$60,000, in form as required in such cases by the laws of the state of Wisconsin, and conditioned in effect as follows: That said McLaughlin should administer, according to the terms of said will and the laws of said state, all the property belonging to said estate, and to render just and true accounts of his administration to said court in Wisconsin. It is further alleged by the answer that said court in Wisconsin has at all times retained its said jurisdiction over the estate, and that McLaughlin, as such executor, from time to time made and filed in said court accounts of his doings as such executor, and such accounts were so filed on the following dates: October 22, 1892; January 19, 1894; April 20, 1895; April 10, 1897; and January 24, 1898. The

answer further alleges that said court in Wisconsin has proceeded to exercise its jurisdiction over said estate, and in so doing has acted upon and allowed claims against the estate, in whole or in part, and that numerous claims so allowed have been paid by said executor upon the order of said court in Wisconsin. The answer further charges that the deceased did not have any estate of any kind or character in the State of North Dakota, save only two parcels of real estate, neither of which were situated in Grand Forks County, and that all of said estate, except said two parcels of land, consisted of real estate in other states than North Dakota, and in notes, mortgages, and other personal property. A copy of the will is made a part of the answer, which will made a large number of bequests and legacies to divers persons and public institutions. The only provision of the will which need be set out is as follows: "I expressly direct that none of the foregoing legacies or bequests are to be paid, but all my estate be allowed to accumulate until such time as the principal and accrued interest of all mortgages and other investments belonging to my said estate shall be sufficient to pay all said legacies and bequests." The answer further states, in effect, that, pursuant to the direction contained in said paragraph of the will, said executor had long prior to the date of the decretal order made by the County Court of Grand Forks County April 19, 1898, reduced to money all of the assets of said estate except the sum of \$6,646.19, which item of uncollected assets the answer alleges has been duly turned over to the plaintiff in this action. The record shows that this item appears as a credit item in the final account filed at Grand Forks, and the same, being uncontroverted, was allowed by the court in the accounting. This item does not, however, enter into the balance found in the hands of the executor, and is not connected with the same. Defendants further allege that said executor, in the discharge of his trust under the will, and in obedience to the directions of the will, had, prior to the date of filing his said final account in the county court of Grand Forks County, from time to time invested and reinvested the moneys of said estate, and that said investments and reinvestments had aggregated about \$50,500; that the net balance as found to be due the estate from the executor as stated in said decretal order is made up entirely of investments made as above stated between January 1, 1897, and December 28, 1897, and for which investments the executor claimed credits in his said final account, but which were disallowed by said court either in whole or in part; and that had all the investments made as aforesaid, and reported in said final account, been allowed and credited to said executor, there would have been no balance or alleged balance in the hands of said executor. Defendants further aver that said McLaughlin has accounted for and turned over to plaintiff all the moneys in his hands realized from the assets of said real estate, and has fully accounted as hereinbefore stated. The evidence offered by the defendants, so far as the same is material, was documentary, and consisted of authenticated exhibits numbered from 9 to 21, in-

clusive. Exhibits 9, 10, 11 and 12 were documents entitled in the County Court of Racine County, and were the accounts of said executor in the matter of said estate, verified by the executor, and filed in said court at Racine; and authenticated copies thereof were also filed in the county court of Grand Forks county. These exhibits, respectively, are dated October 1, 1892; January 11, 1894; April 18, 1895; January 1, 1897. Exhibit 14 is not dated, but it was filed in court at Grand Forks, December 28, 1897, and the same was entitled in the County Court of Grand Forks County. It is further referred to in Exhibit No. 15. Exhibit 15 embraces two papers. One is a duplicate of Exhibit 14, which exhibit was filed in said County Court at Racine on January 24, 1898. The second paper in Exhibit 15 is an order of the Racine County Court calling attention to certain inaccuracies and omissions shown in Exhibit 14; and said order required the executor to file in said court in Racine on or before March 1, 1898, a more complete and detailed account, and embracing certain particulars not satisfactorily set forth in the final account embraced in Exhibit 14, which account was and is a duplicate of the final account filed by the executor at Grand Forks, and upon which the County Court in Grand Forks county acted in making its decretal order on April 19, 1898, as already stated. Exhibit 16 embraces an order of the County Court at Racine fixing the time for the presentation of claims in said court against said estate, and an order stating in detail that certain claims were allowed. This exhibit was not filed at Grand Forks. Exhibits 17 to 21, inclusive, were copies of certain sections of the statute laws of Wisconsin, showing the jurisdiction and powers of the County Courts of that state in the matter of the estates of deceased persons.

Upon this evidence counsel for defendants moved for a directed verdict upon the following grounds: "(1) Because the undisputed evidence in the case shows that the shortage in the accounts of S. W. McLaughlin, which it is sought in this action to recover from defendants, was occasioned solely by reason of his default as trustee under the will of said Catherine L. Wording, and not by reason of any default or misconduct on the part of said McLaughlin as executor under the will of said testatrix. (2) Because the demand sought to be recovered from defendants herein arose through the default of S. W. McLaughlin as trustee under the will of Catherine L. Wording, and plaintiff, as administrator de bonis non of said estate, is not the successor of said McLaughlin as trustee under said will, and has not legal capacity to maintain any action touching the trust property or any of its proceeds. (3) Because the County Court of Grand Forks County, North Dakota, had no jurisdiction to make the order or decree of April 18, 1898, in evidence, for the reason that the defaults recited in said order or decree occurred in relation to personal property, the situs of which was at Racine, Wisconsin, where the testatrix died, and all of which personal property the County Court of Racine county, Wisconsin, always had and retained sole and exclusive jurisdiction, and which property was ob-

tained and held by said McLaughlin subject to the jurisdiction of said last named court, under and by virtue of his appointment as executor under the will of said deceased. (4) Because the evidence in this action is insufficient to show that the County Court of Grand Forks County, North Dakota, had any jurisdiction to make the order or decree of April 18, 1898. (5) Because no order or direction has ever been made or given by the Probate Court of Grand Forks County authorizing plaintiff to bring this action."

The decisive question for determination in this court is whether the direction of the trial court to return a verdict for the defendants was error. To this question, in our opinion, an affirmative answer should be given. It is our opinion that the County Court of Grand Forks County had authority to make the final order or decree which it entered in its records on April 17, 1898. It will be conceded upon this record that the sureties on McLaughlin's bonds are not in a position to question the authority of the court at Grand Forks to issue the ancillary letters testamentary which were issued, or to dispute the binding force of the bond which they have signed and upon which such letters were issued to their principal. The sureties, by signing the bond in suit, entered into an obligation of a specific nature, and one which is measured by the law itself. Section 6349, Rev. Codes, provides that the bonds of executors and administrators shall be "conditioned for the faithful discharge of all the duties of the trust imposed on him by law or by order of the court according to law." We are, therefore, to inquire in this case what duties were imposed by law, or by the lawful orders of the County Court of Grand Forks county, upon the executor for whom these local bondsmen became sureties. To determine the questions involved, account must be taken of certain matters which we deem to be of prime importance. It appears that Catherine L. Wording, deceased, was domiciled at the time of her death in the County of Racine, in the state of Wisconsin, and that her last will and testament appointed said McLaughlin executor under the will. The will was probated in the County Court of said Racine County, and original letters testamentary were issued in due form to said McLaughlin by said court. These letters were issued in May, 1890. It further appears that later in said month of May, McLaughlin presented an authenticated copy of said will, and of the order of court in Racine County admitting the same to probate, to the County Court for Grand Forks County in this state, and that the last-named court thereafter issued to McLaughlin letters testamentary, upon his filing in said court the bond here in suit. It further appears that certain property, both real and personal, belonging to the estate of Catherine L. Wording, deceased, and of the value of \$30,000, was then situated in the State of North Dakota, and in the County of Grand Forks. There is no testimony in this record showing that any inventory of the assets of the deceased was ever made or filed either at Grand Forks or at Racine, Wisconsin; and hence this court is unable, upon this record, to determine either the character or total value of the

property, real or personal, which was situated either in the State of Wisconsin or of North Dakota when letters testamentary were issued in this state, or at any time subsequent to that date, except that it does appear, as a recital in the order admitting the will to probate in this state, that \$30,000 worth of property was then situated in North Dakota. The fact that property, real or personal, belonging to the estate, existed in North Dakota, is not controverted, and is alleged in the petition for ancillary letters, and is found as a fact, and recited by the court in its order issuing such letters. The jurisdiction, therefore, of the Probate Court of Grand Forks County to issue such letters, and to do all and singular the things necessary to properly administer upon all the property coming into the possession of such ancillary executor by virtue of the letters so issued, cannot be questioned. It is elementary in such cases that the sureties upon the bond given locally and for ancillary purposes are responsible only for the faithful conduct of the ancillary executor with respect to duties assumed and property received by him pursuant to his local appointment. In other words, the sureties in such cases have a limited responsibility, and are not bound further. Nor would local bondsmen be responsible for any misappropriation of personal property found in this state, and belonging to the estate of the deceased, or of debts collected in this state by a foreign executor without suit, and while acting solely under the authority of letters testamentary issued in another state by the court of original jurisdiction. The title of all personal property, wherever situated, belonging to the testator, is vested by the will in the executor; and the executor has, by virtue of his title and his letters testamentary, an absolute right to reduce the personal property to possession, and to collect the debts. If it happens that there are local claims or specific liens against personal property, or debts situated or owing in a foreign state, these facts may necessitate the taking out of ancillary letters, and whenever this is done full responsibility on the part of an ancillary executor and his bondsmen attaches as to such debts and property; and this is true where there is real estate belonging to the deceased situated in a state foreign to the domicile of the deceased. The following cases fully sustain these propositions: *Parsons v. Lyman*, 20 N. Y. 103; *Fletcher v. Sanders*, 32 Am. Dec. 96; *Baldwin's Appeal*, 81 Pa. St. 441; *McCord v. Thompson*, 92 Ind. 565; *In re Ortiz's Estate*, 86 Cal. 306, 24 Pac. Rep. 1034; *Fox v. Tay* (Cal.) 24 Pac. Rep. 855.

But counsel for the appellant strenuously contend that the liability of the executor and his local bondsmen is *res judicata*; that the determination made by the County Court of Grand Forks county on April 19, 1898, wherein that court adjudged that a balance of \$8,407.91 was then in the hands of McLaughlin as executor of said estate, and further directing him to pay that amount into that court within a period of 15 days thereafter, is a final judgment of a court of competent jurisdiction, and as such is entitled to all the consideration which belongs to final judgments entered in courts

of record having jurisdiction. In other words, that such judgment, not having been vacated or appealed from, is final, and imports absolute verity. This alleged final judgment is in the record, and the same, together with the proof that it has not been complied with, constitutes the evidence upon which plaintiff claims to recover against the sureties named as defendants in this action. It must be conceded that a judgment entered by a county court of this state in any matter within its jurisdiction is of equal rank and dignity with other judgments entered by courts of record. It is well settled that such judgments can be attacked collaterally only upon jurisdictional grounds, and upon those of collusion or fraud, and in this case neither collusion nor fraud is claimed. It follows, therefore, that this judgment is final, unless the same can be successfully impeached upon jurisdictional grounds. No claim is made by counsel that the decretal order in question is assailable for want of jurisdiction upon any ground existing dehors the record; but, on the contrary, the precise contention is that the alleged defects in jurisdiction arise upon the judgment record itself, and are apparent upon its face. In our judgment, it is not vulnerable upon such grounds. The judgment record in evidence, when most liberally construed, embraces the following papers: (1) An exemplified copy of the will, and of the order of the County Court of Racine county and of Grand Forks county admitting the will to probate. (2) Certain accounts entitled in said estate and in the County Court of Racine county, sworn to by the executor, and from time to time filed in Racine county, and copies of which were filed in this state, and were on file at Grand Forks when the decretal order of April 19, 1898, was entered. These accounts are heretofore referred to as Exhibits 9, 10, 11, and 12. (3) The account denominated a "final account," filed at Grand Forks, December 28, 1897, and upon which the court at Grand Forks expressly bases its judgment of April 19, 1898. This account was, it appears, entitled in the County Court of Grand Forks county, and a duplicate of it was filed at Racine in January, 1898. This account is known in the record as "Exhibit 14." Why a duplicate of this exhibit was filed at Racine does not satisfactorily appear, nor do counsel attempt to explain the circumstance. It is a paper which indicates by its nature, as well as by its title and caption, that it properly belongs among the files of the court at Grand Forks. The County Court, by its judgment of April 19th, makes a statement showing fully and in detail all assets of the estate in McLaughlin's hands, and with which he was chargeable as executor, and also showing all credits due the executor in the matter of said estate. This statement is set out at length in the decretal order. The first part of such statement is as follows: "Said executor shall be charged with assets on hand at last report the sum of \$34,619.04." The "last report" thus specifically referred to is an account of the executor filed in the County Court of Racine county, an authenticated copy of which was on file at Grand Forks, and had been filed there long prior to April 19, 1898. This report is in the record,

and is designated as "Exhibit 12." A reference to this exhibit discloses that the same bears date January 1, 1897, is verified by the executor, and by him filed with the court of original jurisdiction at Racine, and is entitled in the County Court of Racine county. This account (Exhibit 12) embraces an enumeration of and description of the assets of the estate in the hands of the executor at the date of this report. At this time, as appears by this account, the executor had in his hands a large amount in notes and accounts; also a certain amount in cash, and finally certain assets described in the account as follows: "Seventeen loans made since date of Exhibit 11 aggregating \$14,040.00." Exhibit 11, here referred to, consists of the last preceding account of the executor, filed in Racine, and a copy of which was on file at Grand Forks when the decretal order of April 19th was made. Said statement of the executor's account, as embodied in the final adjudication made by the County Court of Grand Forks county, was further based upon said final account of the executor. This final account, like its immediate predecessor, showed that the executor at the date of the account had in his possession a large amount of personal property, consisting of notes, accounts, and collections made since the date of his last account, and cash; also, shows numerous investments made by the executor since the date of his last preceding account, viz: since January 1, 1897, and prior to the date of the final account, which, as has been stated, was filed December 28, 1897. The decretal order recites that certain of these last mentioned investments so made by the executor were scaled down, and some were disallowed in toto, and the balance which the court found to be in the hands of the executor, and which the court ordered the executor to pay into court at Grand Forks, was arrived at by deducting the disallowed items from the total credits as stated in the final account. The decretal order further proceeds to credit the executor in the sum of \$3,000 as disbursed for attorney's fees, and with the further sum of \$1,900.96 as fees and commissions allowed by way of compensation to the executor for his services as such; and these items were, as were all the items in the final account, computed by the court in reaching the balance now sued for. Another of these accounts is embraced in Exhibit No. 9. This account, as far as can be ascertained from this record, is the first account filed in the court at Racine by the executor. It is dated October 1, 1892. It shows the total value of the estate to be \$30,429.35, and that it consists of notes, cash, and accounts on hand, and included, also, seven investments made by the executor, of the total face value of \$7,620. It also shows among the assets of the estate four pieces of land, two of which were situated in North Dakota. None of the other accounts in the record embrace land. These sworn accounts as embraced in Exhibits numbered 9, 10, 11, 12, and 14, and an exemplified copy of the will, and of the order admitting it to probate in Racine, Wis., were on the files of the County Court at Grand Forks; and the same, in our judgment, are embraced in the judgment roll of the adjudication

made at Grand Forks on April 19, 1898. The County Court of Grand Forks county in making said adjudication made express reference to the final account, and to the account next preceding the same; and, in our opinion, there is a conclusive presumption, also, that it acted upon all papers and files then in the court which have a necessary bearing upon the determination which was then made. In disposing of the case, therefore, we shall consider and include in the papers constituting the judgment record in the County Court the several exhibits we have mentioned, as well as the will, and the orders admitting the same to probate in the state of Wisconsin and in this state. From the judgment record of the County Court as thus defined, certain facts stand out in full relief. First, we find that the executor took out letters in the court of original jurisdiction, in which the deceased was domiciled at her death, and that subsequent thereto he took out ancillary letters in this state. In the absence of any inventory, the record is silent as to the circumstances under which the executor took possession of any of the property in this state belonging to the estate, or as to the character or description of the same, except, as before stated, it consisted of both real and personal property aggregating \$30,000 in value, as already shown. The above statement of the facts which is epitomized from the record will, we think, suffice to present the legal questions which are decisive of the case.

It is the contention of the respondents' counsel that the County Court, in making the decretal order of April 19th, which was based upon the final account of McLaughlin as made and filed in that court, acted without jurisdiction. The argument is that this alleged want of jurisdiction may be predicated upon either one of two entirely independent grounds: First, it is claimed that the order in question, when considered in connection with the said accounts and duplicates of accounts,—including said final account,—discloses the fact that the adjudication assumes to pass upon and dispose of a large amount of property which had been taken possession of by McLaughlin by virtue of his original letters testamentary, and that, after being so taken possession of, McLaughlin made a list of such property, and filed the same in said County Court at Racine, Wis., and that said court had ever since retained exclusive jurisdiction over such property. A majority of this court upon the original presentation of the case were of the opinion that this contention of counsel was sustained by the record before us, and we then so held. But our later investigations, aided by the arguments of counsel made upon a rehearing of the case, has led us unanimously to an opposite conclusion. It is our opinion that the several accounts and duplicates thereof which were on file at Grand Forks when the decretal order was made do not show necessarily, much less conclusively, that the situs of the property affected by the order, or any part of it, was ever in the state of Wisconsin, or that the same was originally taken possession of by McLaughlin under his domiciliary letters. None of said accounts indicate on their face the author-

ity under which McLaughlin took the property referred to in them, respectively; nor do the same disclose the locus of the property listed in them when McLaughlin took the same into his possession. It is true that the original accounts, except the last and final account of the executor, were entitled and filed in the County Court at Racine, and that only duplicates thereof were filed at Grand Forks. It is conceded that this fact, standing alone, and wholly unexplained and unmodified by other circumstances, would tend strongly to show that the schedules of property embraced in said original accounts, respectively, consisted of property which McLaughlin had taken possession of under his original letters. Since it was his plain duty to list all property taken under the original letters, and file the list at Racine, the inference is very strong that property listed by him and filed at Racine was taken possession of under the letters issued by that court. But it should not be overlooked that an equally strong inference or presumption arises as to the source and situs of the property listed and embodied in the executor's final account, which, as has been seen, was originally filed in court at Grand Forks, and was also entitled in said court. It was the obvious duty of McLaughlin, under his ancillary letters, to take possession of and keep the property of the deceased found in this state, and only the property located here; it was further his plain duty to file with the court which issued the ancillary letters a verified list of the property obtained by him under such letters, and no other property; and finally it was his duty, on being cited into court for that purpose, to file his final account, embracing a list of all property taken under his local letters, and containing also a verified statement of what disposition, if any, he had made of such property, and no other property could properly have any place in such final accounting at Grand Forks.

We concede that the situs of property, and the source from which it was originally derived, may be indicated by the mere fact that it was listed, and the list filed in a certain court, out of which letters testamentary had issued; but in this case, where letters issued out of courts located in different jurisdictions, account must be taken of the schedules filed in both courts, and particular attention, we think, should be paid to the list of assets embraced in the executor's final account. If mere inferences are to control as to the situs of property, then the inferences to be deduced from filing lists of property in the court at Racine must be offset by those arising from filing the list embraced in the final account filed at Grand Forks. The record before us does not furnish any evidence, nor as much as a suggestion, that McLaughlin or any of the numerous counsel present at the hearing had upon the final account made any question touching the right of the court in which the hearing was had to adjudicate upon all the property and subject-matter contained in the final account there being considered. It does not appear that any one claimed at that hearing that any of the property then involved ever had a situs in the state of Wisconsin. Not only is this record silent

as to any suggestion that the point was made that the court at Grand Forks was wanting in jurisdiction for the reason stated, or for any other, but counsel for respondent tacitly admit that no point of this kind was raised at the hearing, but claim that the point is one which cannot be waived, inasmuch as it goes to the jurisdiction over the subject-matter. But we find evidence in this record that the property affected by the decretal order in question was property originally taken possession of under the ancillary letters, and such evidence is quite independent of the strong inference which arises from the fact that McLaughlin listed the property as property for which he was accountable as executor to the court in which he filed the final account. At the hearing had upon the final account the executor was represented by able counsel, and it appears that such counsel, in open court, and with the full concurrence of the other counsel present, agreed in terms that the final account of the executor then being considered by the court should be stated in that precise way in which the court stated the same, which account, so assented to and stated, embraced debits and credits, and showed the balance against the executor as hereinbefore stated. This assent of counsel in open court furnishes the best possible evidence, we think, that the ancillary executor, as such, was lawfully chargeable with all the property which he had listed in his final account, and which was disposed of by the decretal order in question. Nor can the fact be ignored that the record sent to this court does not purport to embrace all the evidence offered in the County Court at the hearing upon the final account. Nor does this record negative the idea that other evidence in addition to said several accounts and duplicates thereof was taken at the hearing in the County Court. Counsel for the defense offered certain evidence at the trial in the District Court which was on file in the County Court, but who shall say upon this record that such evidence as was offered at the trial was the entire proof submitted in the County Court? Certainly no such inference can be drawn from the record sent to this court. Concluding, upon this branch of the case, we find that the judgment roll and evidence offered at the trial do not necessarily, much less conclusively, show that any of the property affected by the decretal order had its situs in the state of Wisconsin, or that the same, or any of it, was originally taken possession of by the executor under his domiciliary letters. The County Court at the accounting was vested with authority to consider only the subject-matter of the property taken by the executor under the ancillary letters, and to make a decree disposing of such property, and none other. The exigency of the accounting demanded that the court should know and ascertain at the hearing just what property had been taken under the authority of the letters issued by such court. It is certainly legitimate to presume, until the contrary appears, that the court acted within its powers, and that in so doing it considered all the evidence bearing upon the matter of the situs of the property affected by the decree.

As we have said, no inventory of the assets of the estate found in North Dakota was put in evidence at the trial below, yet despite this fact we feel justified—nothing to the contrary appearing—in assuming that such inventory was made by McLaughlin, and in due course was filed in the court at Grand Forks. This presumption is re-enforced by the recital made in the order admitting the will to probate in this state, which, as has been seen, was to the effect that property both real and personal belonging to the deceased, and of the value of \$30,000, was situated in this state when the will was probated here. The law required the executor to take possession of such property, and in due course to inventory the same, and file the inventory in the court granting the ancillary letters. It would manifestly be an unauthorized presumption to assume, in the absence of proof, that the County Court undertook to deal with and dispose of assets which had never been inventoried by the executor, or valued in that court as assets of the estate. We deem it to be our duty to take the opposite view, and assume the filing of an inventory, and that the court, in making its decretal order, dealt exclusively with the property listed in the same. If the County Court acted upon the property listed and inventoried in that court, the decretal order necessarily covered and affected only such assets as were taken into McLaughlin's hands under the letters issued out of that court, and over which that court had plenary jurisdiction.

But counsel contend, secondly, that the record made in the County Court at the accounting at Grand Forks shows upon its face that the court then and there assumed to adjudicate upon, and dispose of by its decretal order, certain property then in McLaughlin's hands, not as ancillary executor, but as testamentary trustee under the will. Counsel claim, and it seems to be conceded, that under the laws of the state of Wisconsin the County Courts do have jurisdiction over testamentary trustees, and that the County Courts of this state have no such jurisdiction, and hence that any action taken or decree made by the County Court at Grand Forks affecting trust property in the hands of McLaughlin in his capacity as trustee would be void on its face, as made without authority of law. The assumption that McLaughlin had in his hands at the time of the accounting certain assets of the estate, which were trust funds, and held as a trustee by him, rests wholly upon the fact that it appears on the face of the accounts, and particularly by the final account filed at Grand Forks, that McLaughlin had invested funds acquired by him as executor, and particularly that said account showed that such investments had been made to an amount exceeding \$14,000 during the year next preceding the date of filing the final account; that such investments appeared in the final accounts as credits, and the same was represented by certain notes and securities then in McLaughlin's hands, and for which he was then willing to account as executor. McLaughlin claimed, of course, that such securities were in his hands as executor, and he gave himself credit for the same in his said account as executor. Nor is there a trace of evidence or reason to suppose that Mc-

Laughlin or any one else at the hearing in the County Court claimed or suggested that the securities in question were not in his hands in his capacity as ancillary executor, or that he held such securities as trustee. The court, however, declined to allow all of these securities as credits, but, after allowing some of them, disallowed others in whole or in part. It is claimed that the balance or deficit found against McLaughlin as executor was caused by scaling down the securities arising from the investments. Here, again, it is necessary to revert to the fact that neither the District Court nor this court is in a position to know all the data which were before the County Court at the accounting. As has been seen, the record shows nothing of the inventory filed at Grand Forks. It is silent, also, as to whether other oral or written testimony not in this record was in fact taken in the County Court. Counsel stand on the bare fact that McLaughlin himself stated in his final account, in effect, that he had in his hands as ancillary executor certain notes and securities which were taken as a result of investments of funds in his hands as executor. But is such a statement conclusive of the facts? We think otherwise. In such a case we think it would be the duty of the court to inquire into the matter, and, among other things, determine the preliminary fact whether the securities on hand were in fact taken as a result of investing the funds of the estate, or were some other securities. Again, such securities could not, against objection, be lawfully accepted in lieu of cash. If property inventoried had been converted into cash, the burden would be upon the executor to produce the cash; nor would any new securities answer in lieu of the money, except in cases like that at bar, where all parties interested in the estate came into court and voluntarily agreed to accept certain securities in lieu of money. It was, therefore, the duty of the County Court to refuse to allow and give credit for any new securities, except in so far as the securities were voluntarily accepted by all parties interested in the estate or its proceeds.

We have seen that neither the executor nor his counsel ever advanced the idea at the accounting that the proceeds of the estate obtained under the ancillary letters could be accounted for by simply taking credit as executor, and charging the same to himself in his capacity as trustee. No such charge was made in fact in the final account, and, as we have said, no such idea appears to have been broached at any time in the County Court. But if the executor at the accounting had sought to account for any of the proceeds of the estate by simply taking credit for the same as executor, and charging them to himself in his capacity as a trustee, we think such a charge could not have been upheld. The court at Grand Forks was wholly devoid of authority to deal with the executor in his trustee capacity, and that capacity was wholly foreign to the relation created by the ancillary letters. Under such letters the executor's duties were circumscribed. After paying local claims, if any, the ancillary executor was limited to the mere matter of converting the proceeds of the estate received under his letters into money, and then, after

making his final account, to turn over the net proceeds of the estate to the domiciliary executor, to be distributed and disposed of under the will by the court of original jurisdiction. Thus it will be seen that the ancillary letters conferred no powers upon McLaughlin as a testamentary trustee; nor did the court which issued such letters have the least authority to deal with McLaughlin as trustee under the will, and, as we have shown, the court at Grand Forks did not attempt to administer the trust, or to deal with McLaughlin in his capacity as trustee under the will. The court simply refused to give the executor credit for certain securities which McLaughlin had at the accounting, and which McLaughlin had in his account given himself credit for in his capacity as ancillary executor. We think the action of the County Court was entirely proper, and could not have been different under the law. We are therefore of the opinion that the judgment offered in evidence at the trial in the District Court did not show on its face that the County Court was without jurisdiction to enter the decretal order of April 19, 1898. It must follow from what has been said that the District Court erred in directing a verdict for defendants upon the ground that the records of the County Court put in evidence showed on their face that the County Court was without jurisdiction to enter the decretal order which is the basis of this action. A new trial will therefore be ordered.

The judgment sued on not being invalid for want of jurisdiction, counsel contend that it is merely *prima facie* evidence of its contents, and is not conclusive. We shall hold that the judgment is conclusive, and imports the same degree of verity as judgments entered by courts of record in this state. All doubts upon this point are absolutely settled by section 6186, Rev. Codes 1899, which declares, "The proceedings of a County Court in the exercise of its jurisdiction are construed in the same manner and with like intentions, as the proceedings of courts of general jurisdiction, and to its records, orders and decrees there is accorded like force, effect and legal presumptions as to the records, orders, judgments and decrees of courts of general jurisdiction." But if the judgment were mere *prima facie* evidence of its contents, and hence disputable, we should hold, upon grounds already stated, that the County Court was fully justified upon the evidence in entering the judgment which was entered by the full consent of all the parties interested in the estate.

We might safely place our ruling upon an additional ground, not before mentioned. It is this: We have seen that there is not a particle of evidence in this record that at any time prior to the accounting in question, or since that time, McLaughlin ever claimed to act in his capacity of trustee under the will. It is equally true that no evidence is in this record tending to show that he had taken the steps which the law requires to be taken in order to relieve himself or his bondsmen from liability for his acts done as ancillary executor. It seems to be settled by the decided weight of the adjudications that where an executor is also a trustee under a will,

and qualifies as executor, he and his sureties will be bound until such time as the executor shall account as executor and qualify as a trustee. There must be some open and notorious act done by the executor whereby it may be known that the line has been crossed which separates the capacity of the executor from that of the trustee. We cite only a few of the many authorities supporting this proposition. *Prior v. Talbot*, 10 Cush. 1; *Conkey v. Dickinson*, 13 Metc. (Mass.) 51; *Newcomb v. Williams*, 9 Metc. (Mass.) 525; *Miller v. Congdon*, 14 Gray, 114; *White v. Ditson*, 140 Mass. 351, 4 N. E. Rep. 606; *Groton v. Ruggles*, 17 Me. 137; *Williams v. Cushing*, 34 Me. 370; *In re Higgins' Estate* (Mont.) 39 Pac. Rep. 507, 28 L. R. A. 116; *Bellinger v. Thompson* (Or.) 37 Pac. Rep. 714; *Cranston v. Wilsey* (Mich.) 39 N. W. Rep. 9; *Newport Probate Court v. Hazard*, 13 R. I. 1; *State v. Branch*, 134 Mo. 592, 36 S. W. Rep. 226.

But it is urged that the sureties on the executor's bond who did not appear at the accounting, and were not cited to appear, are not bound by the adjudication made at the accounting. There is some authority sustaining this contention, and holding that the questions settled as against the executor may be relitigated in an action brought against the bondsmen, and that in such an action the record of the adjudication is only presumptive and not conclusive. See *Lipscomb v. Postell*, 38 Miss. 476; *Gibson v. Robinson*, 90 Ga. 756, 16 S. E. Rep. 969; *Bird v. Mitchell*, 101 Ga. 46, 28 S. E. Rep. 674. But, in our judgment, the better rule, and that supported by a very decided weight of authority, is to the contrary. In *Wolff v. Shaeffer*, 74 Mo. 154, the court said, "The surety on an administrator's bond is concluded by, and cannot attack collaterally, a final settlement from which there has been no appeal. See, also, *Dir v. Morris*, 66 Mo. 614; *State v. Creusbauer*, 68 Mo. 254; *Slagle v. Entrekin*, 44 Ohio St. 637, 10 N. E. Rep. 675; *Wehrle v. Wehrle*, 39 Ohio St. 365; *Cason v. Jerome*, 58 N. Y. 315; *Braiden v. Mercer*, 44 Ohio St. 339, 7 N. E. Rep. 155; *Irwin v. Backus*, 25 Cal. 214; *Heard v. Lodge*, 20 Pick. 53; *Garber v. Com.*, 7 Pa. St. 265; *Salter v. State*, 5 Ind. 202; *People v. White*, 11 Ill. 341; *Ralston v. Wood*, 15 Ill. 160; *Holden v. Curry* (Wis.) 55 N. W. Rep. 965; *Jenkins v. State* (Md.) 23 Atl. Rep. 608. This rule is firmly settled in Wisconsin. See *Meyer v. Barth*, 72 N. W. Rep. 748; *Shepard v. Pebbles*, 38 Wis. 373. Of course, this rule does not preclude a collateral attack upon a final judgment when made by the bondsmen upon the ground of fraud and collusion, but in the case at bar there is no fraud or collusion charged. But respondents' counsel concede that, while the rule as above stated is established by a preponderance of authority, the same is not sound in principle, and that it has been swept away and the opposite rule established by the statute; citing chapter 69 of the Civil Code, which defines and regulates contracts of indemnity. While it is true that bonds of executors, administrators, and guardians are obligations in their

nature closely allied to indemnity contracts, nevertheless we are clear that a decided preponderance of authority will be found to distinguish such bonds from contracts of indemnity. Some authorities declare that these bonds are simply exceptions to the rule, while other courts declare that they differ radically in their nature from indemnity contracts, and hence cannot be classed as exceptions, but stand entirely upon their own terms and legal effect. In New York the reason of the distinction, as stated in *McMahon v. Smith*, 24 App. Div. 25, 49 N. Y. Supp. 93, is that the surety voluntarily places himself in privity with the administrator or executor, and is therefore bound by any decree that the surrogate has jurisdiction to make. The majority rule is upheld by the courts of Alabama, Arkansas, Louisiana, Maine, Massachusetts, Michigan, Missouri, New York, Oregon, Pennsylvania, South Carolina, and Texas. The authorities from the states mentioned will be found in note 2, p. 901 (2d Ed.) 11 Am. & Eng. Enc. L. The judgment will be reversed, and a new trial ordered. All the judges concurring.

BARTHOLOMEW, C. J. I concur in the result announced in the opinion formulated by Justice Wallin. I do not believe, and for the reasons stated by my associate, that these defendants can be heard to say that their principal held the property for which he was charged by the County Court of Grand Forks county in the capacity of testamentary trustee, and not as executor. Nor do I believe that these defendants can assail the final order made by said court on any grounds other than fraud, collusion, or want of jurisdiction. They do assail it in this case for want of jurisdiction of the subject-matter. We have nothing before us except the documentary record upon which such final order was based. We must indulge in support of that order every presumption that would be indulged in support of the final judgment of a court of general jurisdiction. Rev. Codes, § 6186. It follows that jurisdiction must be presumed unless the record conclusively shows the want of jurisdiction. I wish to examine that record briefly, because the principal opinion does not clearly disclose the reasons that control my decision.

Catherine L. Wording died testate about March 1, 1890, at Racine county, in the state of Wisconsin; she being domiciled in said county at the time of her death. By the terms of her will, one McLaughlin, a resident of Grand Forks county, in this state, was named as sole executor. Such will was duly proved and admitted to probate by the proper court in Racine county, Wis., on May 6, 1890, and bond required. The record does not show whether any bond was given or not, but, as will appear, it does show that the executor proceeded with his duties as such in such court. In due time a copy of the will, with proof of probate thereof, was filed in Grand Forks county, in this state, with the petition of the executor asking that the will be admitted to probate in said county. The petitioner alleged that there was real and personal property belonging to the estate, and situate in this state, of the value of \$30,000. Such

proceedings were had that on May 21, 1890, said will was admitted to probate in said county, the order reciting that there was property of said estate in this state; and on July 1, 1890, the bond of said executor in the sum of \$60,000, with these defendants as sureties, was duly filed and approved. As these defendants, if liable at all, can only be held for some default in connection with the ancillary executorship, it becomes pertinent to inquire what court, in legal contemplation, and in the absence of special circumstances, had jurisdiction over the personal property of said estate. We get no aid from any inventory, because, so far as this record shows, no inventory was filed in either court. It is conceded that for the purpose of ultimate distribution the domiciliary court has exclusive jurisdiction, but denied that such court has exclusive jurisdiction for ordinary administration purposes. I think, however, that the ordinary rule as to personal property should be applied in all such cases, and that the situs of the personalty must follow the domicile of the owner, and I do not think this is changed in the least by the fact that such personal property consists of evidences of debts owing by parties resident in other states. *Doolittle v. Lewis*, 7 Johns. Ch. 45; *Vroom v. Van Horne*, 10 Paige, 549; *Middlebrook v. Bank*, 41 Barb. 481; *Parsons v. Lyman*, 20 N. Y. 103. And when the domiciliary executor receives a voluntary payment from a debtor in a foreign jurisdiction, no ancillary executor having been appointed in such jurisdiction, the payment so received must go into the account of the domiciliary executor. See cases last cited, and also *Baldwin's Appeal*, 81 Pa. St. 441; *McCord v. Thompson*, 92 Ind. 565; *In re Ortiz's Estate*, 86 Cal. 306, 24 Pac. Rep. 1054. It does not follow from this that such executor could satisfy a mortgage in a foreign jurisdiction, or assign such mortgage. Another rule that is well settled, and I think universal, is that, when it becomes necessary to go into the courts of a state in order to enforce claims of an estate of one who died domiciled in another state, a domiciliary executor will not be recognized. For this reason the existence of debts in another jurisdiction has always been held sufficient ground for ancillary proceeding. See *Schouler, Ex'rs*, § 24, and cases cited. And, no doubt, after ancillary proceedings had been had all property coming to the hands of the ancillary executor as such, whether by voluntary or enforced payment, must be accounted for in the ancillary court. Now, in the case at bar the general jurisdiction of the County Court of Grand Forks county cannot be questioned, nor can it be questioned that there was property belonging to the estate within that jurisdiction. The difficulty lies in excluding the domiciliary court from jurisdiction over any of the property involved in the final accounting made by the ancillary court. After the approval of the bond and granting of ancillary letters, as hereinbefore stated, the next document that appears in the record is known as "Exhibit 9." It is an authenticated copy of account filed by the executor, entitled in the County Court of Racine county, Wisconsin, "In the

Matter of the Last Will and Testament of Catherine L. Wording, Deceased." It bears date October 1, 1892. This was more than two years after the issuing of both the domiciliary and ancillary letters. The account shows notes and accounts on hand, as per itemized list, \$16,820.43; cash collected, \$13,186.28. It also recites cash, as on hand (at some past statement or accounting, presumably) in the sum of \$1,561.82. It also shows disbursements for funeral expenses and sundry investments. As stated, this report was made to the Wisconsin court, and purported, of course, to deal with property received by the executor by virtue of his appointment by such court. Yet there is nothing whatever in the report to show from what source any of this cash was received. It is physically possible that it might have been received in the ancillary jurisdiction after the issuance of the ancillary letters. It is possible, too, that all the notes and accounts mentioned may have been owing by residents within the ancillary jurisdiction. In other words, it is possible that the Wisconsin court had no jurisdiction of any of the assets set forth in the report. On April 17, 1894, an exemplified copy of this report was filed in the case in the County Court of Grand Forks county. On the same date an exemplified copy of the next report made to the Wisconsin court (Exhibit 10) was filed in the County Court of Grand Forks county. This report was filed in the Wisconsin court January 19, 1894, and is of the same general nature as the preceding report, and shows notes and accounts on hand, over \$9,000 collected since last report, a number of investments, and claims to the amount of \$1,432.91 against the estate paid. Why these reports were filed in both courts is matter of conjecture. It was not possible that both courts should have jurisdiction over the same specific property. The filing in one court or the other was a useless act. True, after the assets in the ancillary jurisdiction had all been reduced to cash, or to a condition proper for distribution, and a final settlement of the estate had in the ancillary jurisdiction, the balance then on hand must be passed to the domiciliary court for final distribution. Then for the first time does the jurisdiction of that court attach. As I have stated, it is possible that all of this cash and these notes and accounts properly belonged in the ancillary jurisdiction. True, it seems from this last report that the executor had been using cash in his hands to pay claims in the Wisconsin court. But I will presume, in support of this judgment, that in so doing he exceeded his authority. Exhibits 11 and 12 are reports of the executor made in the Wisconsin court, and an exemplified copy subsequently filed in the Grand Forks County Court. They do not differ in their general tenor from the prior reports already mentioned. The next report is Exhibit 14, made in response to the order of the ancillary court, and filed first in that court, and subsequently in the Wisconsin court. It was upon the coming in of this report that the final order was made. This final order (Exhibit 7).

after scaling down or disallowing certain investments reported, continues: "Upon a full hearing of said account, and by the consent of all parties represented, it is ordered, adjudged, and decreed that said account be stated as follows: Said executor shall be charged with assets on hand at last report the sum of," etc. This clearly shows that this final order was based upon and related to the specific property covered by Exhibit 12,—a report made to and filed originally in the Wisconsin court, and which, in its turn, was based upon preceding reports all made to and originally filed in that court. But all presumptions must be indulged in favor of the validity of this final order. We cannot hold that it was made without jurisdiction unless it conclusively so appears from the record. In my judgment, it does not so appear, and I do not base this upon the assumption that there may have been evidence dehors the record showing jurisdiction. I think the record rebuts anything of that kind. Nor do I base it upon the assent of counsel to the order. That assent could not confer jurisdiction over the res. I base it simply upon the record as herein discussed. The judgment is properly reversed.

(83 N. W. Rep. 875.)

STATE OF NORTH DAKOTA, EX REL CHARLES E. WOLFE, vs. FRED
FALLEY, SECRETARY OF STATE.

Opinion filed October 19th, 1900.

Elections—Secretary of State—Certification of Candidates.

Under the statutes of this state, requiring the secretary of state to certify to the proper county officer the names of all persons whose nominations for office have been filed with him, such secretary has no judicial power to inquire into the regularity or legality of such nominations.

But One Person Nominated by One Party—Convention Nominations.

But the statutes of this state contemplate that only nominations made by a convention representing a political party or principle shall be filed with such secretary, and, further, that only one person can be nominated by one party for a single office, and that the name of but one candidate for a single office shall appear upon the official ballot under one party heading. When, therefore, two nominations, purporting to be by the same political party for the same office, are filed with him, it is his duty to refuse to certify to the proper county auditors the names contained in both nominations. The law requires him, however, to certify the name of the regular party nominee, and, if he refuse so to do, he may be coerced by mandamus.

Two Nominations for Same Office—Determination.

Where the judicial district central committee of a political party calls a judicial district convention for the purpose of nominating a district judge, and such convention divides, and two conventions are in fact held, and two nominations made and properly filed, each claiming to be the regular party nominee, the courts of this state will, upon proper application, determine which is the regular party nominee.

Bolting Convention—Powers of Central Committee.

Where a judicial district central committee, in calling a district convention fix the time and place and the basis of representation thereto, said committee cannot go further, and dictate the manner in which, and conditions under which, the delegates to such convention shall be elected by the various counties. Such power belongs to the county central committees of the various counties, and delegates elected to said convention under the direction of the county central committee, and in conformity to the established usages of the party, are regular and lawful delegates, although not elected as directed by the district committee.

Original application for mandamus by the state on the relation of Charles E. Wolfe v. Fred Falley, Secretary of State.

Writ granted.

Cochrane & Corliss, for relator.

A public officer charged with the duty of certifying nominations cannot conclusively determine who has been legally nominated so as to entitle his name to be certified. *State v. Miller*, 39 N. E. Rep. 24; *Williams v. Lewis*, 54 Pac. Rep. 339; *Shields v. Jacobs*, 50 N. W. Rep. 105; *State v. Allen*, 62 N. W. Rep. 35; *State v. Falley*, 8 N. D. 90; *Baker v. Board*, 68 N. W. Rep. 752. The secretary is not bound to certify all nominations apparently regular on their face, otherwise there could be, on the official ballot, two or more names purporting to be the candidates of the same party, for the same office, contrary to the spirit and intent of the ballot law. §§ 491, 498, 502, 504, Rev. Codes; *State v. Weir*, 31 Pac. Rep. 417; *Baker v. Board*, 68 N. W. Rep. 752; *State v. Allen*, 62 N. W. Rep. 35; *Phelps v. Piper*, 67 N. W. Rep. 755; *State v. Piper*, 69 N. W. Rep. 373. The court may inquire on mandamus as to which of the two rival candidates is lawfully nominated by the party. *McDonald v. Hinton*, 46 Pac. Rep. 870; *State v. Tucker*, 46 Pac. Rep. 530; *State v. Johnson*, 46 Pac. Rep. 533. Unless a candidate has been regularly nominated by a party convention the law requires his name to be placed in nomination by petition, § 501, Rev. Codes, and no person who goes on the ballot by petition can select a party designation already in use by an existing political party. *State v. Rotwitt*, 46 Pac. Rep. 370; *Atkeson v. Lay*, 22 S. W. Rep. 481; *Philips v. Curtis*, 38 Pac. Rep. 405; *McCoach v. Whipple*, 51 Pac. Rep. 164. Therefore, if the court cannot, on mandamus, inquire into the question of fact as to who is the lawful nominee of the party, the whole policy of the law may be subverted.

John F. Philbrick, Assistant Attorney General, for defendant.

BARTHOLOMEW, C. J. On the application of Charles E. Wolfe, as relator, this court issued an alternative writ of mandamus directed to the Honorable Fred Falley, as secretary of state, directing him to certify to the proper county auditors the name of relator as the nominee of the Republican party for the office of district judge of the Fourth judicial district, or show cause for not so doing; said

district being composed of the counties of Richland, Ransom, Sargent, Dickey, and McIntosh. The facts upon which relator bases his claim as such nominee were set out at length in the alternative writ, and, omitting all formal parts, and stating only the facts that raise the controversy, are as follows: The judicial district Republican central committee in said district, in calling the judicial convention, fixed the time and place for holding the same, and the representation for the several counties composing the district, and then proceeded to direct that the caucuses in the various precincts in the several counties composing the district should be called for the special purpose of electing delegates to a county convention that should be held for the exclusive purpose of electing delegates to the judicial district convention, and declaring that the county conventions that selected delegates to the judicial convention should not elect delegates to any other convention or transact any other business, and declaring, further, that any delegates to the judicial convention not elected in conformity to such directions would not be recognized by said judicial committee, or permitted to participate in the preliminary organization of the judicial convention. It further directed that in case the proper county committees refused or declined to call the caucuses and conventions as directed, by a time specified, then the member of the judicial district committee for such county should proceed to call such convention, and provide for the election of delegates thereto. Relator alleges that in these special directions the said judicial district central committee exceeded its powers, and violated the usages of the Republican party in this state; that by said usages the various counties have each its own county Republican central committee, and that the calling of all county conventions, as well as all precinct, township, or ward caucuses within the respective counties, is within the exclusive control and management of such county committee; that the action of said judicial central committee in assuming to control the county conventions and the caucuses was without precedent, and in direct conflict with party usages in this state; and that said action had never been authorized by any representative convention of the Republican party in this state or in said judicial district. It is further alleged that said directions were disregarded by the county of Richland, which county was entitled to 17 delegates in the Republican judicial convention; that in said county a county convention was called by the proper county committee for the purpose of electing delegates to the Republican state convention, and for the purpose of electing delegates to the Republican judicial convention, and for the purpose of nominating candidates for the various county offices in said county; that caucuses were properly called throughout the county, and delegates elected thereby to attend the county convention; that said county convention met pursuant to call, and elected 17 delegates to said judicial convention, all of whom favored the nomination of relator as the Republican candidate for judge of said district, and the election of such delegates was duly and properly certified by

said county convention to said judicial district convention, and such certificate was duly filed with the proper officers before said convention met; that at the time and place appointed for said convention all of said delegates appeared, and also the delegates from the four other counties composing said district, but there was no contest as to the delegates from such other counties; that, when the delegates were called to order, the secretary of the judicial central committee read a list of the names of those who were entitled to vote and participate in the preliminary organization of the convention; that none of the delegates so elected from Richland county were named in said list, but in their stead 17 other persons, residents of Richland county, were named in said list as delegates from said county. It is alleged that the persons so named were never elected as such delegates by any convention, but that they were present as spectators, and to further the interests of an opposing candidate. It is further stated with particularity that when an attempt to organize was made there was an immediate split in the convention; that the delegates from the counties of Sargent and Dickey, 16 in number, together with the 17 men named by the secretary of the central committee, as aforesaid, as delegates from Richland county, proceeded to organize a convention, while the delegates from Ransom and McIntosh counties, 16 in number, together with the 17 delegates so as aforesaid elected from Richland county, and favorable to relator, proceeded to organize a convention. The first-named convention nominated one W. S. Lauder as the Republican candidate for district judge of the Fourth judicial district, and the other convention nominated the relator as such candidate; the vote in each convention being unanimous, and both of said nominations being regularly certified to the secretary of state. But relator claims that by reason of the facts stated he was and is the duly-elected and regular Republican nominee for such judgeship, having received therefor the vote of a majority of all the persons properly elected as delegates to such convention. It appears by notice and return on file in this court that a copy of the alternative writ was served upon W. S. Lauder. But upon the return day he was not represented, and, so far as appears, does not oppose this proceeding. But that fact does not relieve the situation. The defendant, the secretary of state, answers, expressly admitting the facts set forth in the alternative writ, and stating that he refuses to certify the name of the relator to the proper county auditors as the Republican nominee for judge of the Fourth judicial district, because there have been filed in his office two nominations for said office, each claiming to be the regular Republican nomination, and each regular in form and fair on its face.

It requires no argument to show that one political party cannot hold two separate conventions at the same time, and nominate two different persons to fill one office. If two nominations for the same office by the same party are filed, one or the other must be spurious. Both may be spurious, but both cannot be genuine. It is perfectly clear, from section 502, Rev. Codes, that the legislature never in-

tended that one party should have more than one candidate for any one office. The section declares: "No certificate shall contain the name of more than one candidate for each office to be filled." Section 504 requires the secretary of state to certify to the proper county auditors "the name and postoffice address of each person nominated for such office as specified in the certificates filed with him. But certificates can be filed with him only in pursuance of nominations made by a convention representing a party or a principle. Such is the clear purpose of the law. Sections 497a to 512, inclusive. But one party can make but one nomination for one office. Hence he can properly certify but one nomination by the same party. This is made clear by the provisions of section 491, which permits a voter to vote for the entire party ticket by marking a cross in the square following the party named. This the voter could not do if there could be two candidates for one office under the same party heading. From this it follows that it is the duty of the secretary of state to certify the genuine party nominee. See the case of *State v. Weir*, (Wash.) 31 Pac. Rep. 417. It becomes necessary, then, that there should be a final determination as to who is the real party nominee. Of course, the pleadings in this case admit that the 17 so-called delegates from Richland county, who voted for W. S. Lauder, were not legal delegates to said convention. That may establish the fact that Mr. Lauder was not the regular nominee of the Republican party, but it does not establish the fact that relator was such nominee. It will be noticed that the delegates to said convention aside from the Richland county delegates, were evenly divided between the two candidates, so that, unless the Richland county delegates who supported relator were legal delegates, he is not the nominee of the Republican party. The whole case turns, then, upon the legal character of that delegation; and that question, in turn, hinges upon the power of the judicial central committee. If that committee had the power to determine the manner in which, and conditions under which, the delegates to the judicial convention should be elected by the several counties, then clearly such Richland county delegation was not legal, as confessedly it was not elected in the manner or under the conditions prescribed by such committee. If, on the other hand, such committee had no such power, then such delegation was legal, because, confessedly, it was elected in conformity with established usage of the Republican party.

But who shall decide this question? We held in *State v. Falley*, 8 N. D. 90, 76 N. W. Rep. 996, that the powers of the secretary in certifying nominations that had been filed with him were ministerial only, and that he could exercise no judicial functions in that regard. Our reasons were there fully stated, and need not be repeated here. Where provisions are made by statute for filing objections with the certifying officer, he may have judicial functions. See *State v. Miller* (Ohio) 39 N. E. Rep. 24. But even under such a statute his powers are strictly construed and limited. See *People v. District Court of Arapahoe Co.* (Colo. Sup.) 31 Pac. Rep.

339. And under statutes similar to ours it is universally held that he has no judicial powers. See *Williams v. Lewis* (Idaho) 54 Pac. Rep. 619; *Shields v. Jacobs* (Mich.) 50 N. W. Rep. 105, 13 L. R. A. 760; *State v. Allen* (Neb.) 62 N. W. Rep. 35; *Baker v. Board* (Mich.) 68 N. W. Rep. 752. It follows, then that the secretary of state could institute no judicial inquiry to determine which of two or more nominations, all fair on their face, and all purporting to be the nomination of the same party for the same office, was in fact the regular nomination of such party. He clearly can certify only one name for one party for one office, because, as already seen, only one name can go on the ticket. It may be that under such circumstances he might certify any one of the nominations so filed with him, and, if no objection were made until after election, it might then be too late to question the legality of the nomination. We express no opinion upon the point. But where, as in this case, he refuses to certify the name of the person claiming to be the regular party nominee, the power must rest somewhere to determine whether or not such claim be well founded; and, if well founded, there must be power to compel the certification of such name, and such power can only exist in the courts. It is true that in the case of *State v. Falley*, supra, we held that, since the secretary could exercise no judicial functions, where a nomination was filed with him, fair on its face, he must certify the name of the person therein specified, unless properly restrained, and that when called upon to do so he could not excuse himself by saying that such a nomination was not regular or legal. But it is plain that we used the language in the same sense in which it is used in section 504, which requires the secretary to certify the name "of each person nominated for such office as specified in the certificates of nomination filed with him." That means party certificates, because, in the contemplation of the statute, no other can be filed with the secretary. Where only one certificate of nomination, purporting to be the nomination of a certain named party for a certain named office, is filed with the secretary, it becomes as to him the party nomination, and he cannot question it. But it is self-evident that this cannot be true where two certificates are filed, each purporting to be the nomination of the same party for the same office. It is an uncontrovertible fact that there cannot be two nominees by one party for one office that is filled by one person. Hence one of such certificates, at least, cannot contain the regular party nomination. It requires no judicial investigation to determine that fact. It is patent and conclusive. He cannot certify both names, because both cannot go on the same party ticket. He is in duty bound to refuse to certify both. Perhaps he may properly refuse to certify either, as we understand he did in this case, but certain it is he must refuse one.

There has been some hesitation on the part of the courts to enter upon an investigation as to the party character of conventions. Where state conventions were held by two factions of a party, each having a complete political and party organization, with the appear-

ance of *de facto* parties, and each claiming to be the convention of the one party, the Supreme Court of Nebraska, under the statute in that state, refused to decide between the factions, but required both tickets to be placed upon the official ballot. *State v. Allen*, 62 N. W. Rep. 35; *Phelps v. Piper*, 67 N. W. Rep. 755, 33 L. R. A. 53; *State v. Piper*, 69 N. W. Rep. 378. See, also, *People v. District Court of Arapahoe Co.*, and *Shields v. Jacobs*, *supra*. Is it true that those cases were decided, as the opinions show, under statutes that conferred judicial functions upon the certifying officer, and making his decision final unless reviewed as pointed out by the statute. But the decisions appear to have been based largely upon the proposition that each faction was a party, and entitled to appear on the ticket just as they would be with separate names. Yet those cases expressly recognize a different holding under different statutes. In *State v. Piper*, *supra*, it is said: "Decisions of other states which hold that courts will determine which faction of a political organization is the regular one and entitled to recognition were for the most part based upon statutes materially different from ours." And again in the same case: "Yet the court, in a proper case, will determine whether nominations were in fact made by *de facto* conventions of the parties, even though the same may lead to the investigation of political methods." But, as holding directly that the regularity and legality of conventions will be investigated and determined by courts, see *Baker v Board* (Mich.) 68 N. W. Rep. 752; *State v. Rotzitt* (Mont.) 46 Pac. Rep. 370; *McDonald v. Hinton* (Cal.) 46 Pac. Rep. 870, 35 L. R. A. 152; *State v. Tooker* (Mont.) 46 Pac. 530. Indeed, under our statute, which gives the certifying officer no judicial powers, and which requires party nominations to be filed with the secretary of state, and which contemplates that no nominations shall be filed with him except those made by political parties, it becomes absolutely necessary that the courts should pass upon the regularity of such nominations; otherwise, the door for fraud and deception must stand wide open, and no power exist anywhere to close it. Perhaps we were not justified in taking any space to demonstrate that this court had the power and it is its duty to act in this matter.

What were the powers of the Republican central committee of the Fourth judicial district? Could that committee invade the jurisdiction that had been exercised by county central committees since the organization of this state? Could it dictate to the county committees, and substitute its will for theirs, and in effect arrogate to itself the performance of all those duties that had hitherto pertained to county committees? We know of no basis for such a claim. We know of no powers possessed by such central committee, except to preserve the district party organization, and take the preliminary steps to insure the next succeeding convention, to-wit: to fix the time and place and basis of representation for such convention. To these may be added a power that has been sanctioned by a usage which may have existed long enough to require judicial notice, and

that is the power to so far pass upon the claims of contesting delegations as to say which, if either, shall participate in the preliminary organization. But in this case, under the conceded facts, there were no contesting delegations from Richland county. Aside from the delegates favorable to relator, there were no persons claiming to be delegates from that county claiming to have any authority from any convention or mass meeting or any other source. To hold that such committee might exclude the Richland county delegates favorable to relator, because not selected in the manner prescribed by that committee, would be to hold that such committee had power to prescribe such manner. But that power we deny. The language of the Supreme Court of California in *Hutchinson v. Brown*, 54 Pac. Rep. 738, 42 L. R. A. 232, is very instructive on this point. The court said: "One objection of the respondent is that by the call of the executive committee the People's Party convention was assembled for the purpose of nominating a full ticket, and, of course, a full ticket of Populists, and that if there was to be any fusion, or joint action with other parties, it was only to be the action prescribed by the executive committee, and put forth as part of the call for the convention. As to this, it is enough to say that, according to universal party usage in California, the central or executive committee of a party has no function, after one election is over, except to preserve the organization, and take the necessary preliminary steps for the assembling of the next convention. It has no right to forestall or in any manner limit or curtail the powers of the convention which it calls. The convention, when assembled, is the depository of all party power, and so continues until it adjourns, after which a new committee comes into power for the mere purpose of subserving the party interests pending the election, and of doing thereafter such things as may be provisionally necessary to keep up the regular organization and call another convention. It is, therefore, of no consequence what resolutions the executive committee chose to couple with its call for the People's Party convention. They were merely advisory, and as advice, were worth just what the convention chose to rate them at."

We are clear that the Richland county delegates favorable to the relator were the legal and proper delegates from said county to said judicial convention, and that relator was nominated as a candidate for judge of the Fourth judicial district by a majority vote of all the delegates composing such convention, and in a convention in which all of such delegates participated or might have participated. Relator is therefore the regular nominee of the Republican party. Let the peremptory writ issue as prayed. All concur.

YOUNG, J. (concurring). I agree with my associates that the writ should issue to compel the secretary of state to certify relator's name to the different county auditors as the Republican nominee for district judge of the Fourth judicial district. I reach this conclusion, moreover, upon ground which does not involve an investigation of the regularity of relator's nomination. It appears that two

certificates were filed in the secretary's office, one certifying the name of the relator, and the other that of W. S. Lauder, for the same office, and each purporting to be the regular Republican nomination. Both certificates are regular in form. Either certificate, if standing alone, is sufficient to require the secretary to certify down the name contained therein, without investigation. His embarrassment arose from the fact that two certificates were filed, showing two candidates, and he could not certify both. This ground for refusing to act existed at the time the alternative writ issued, but on the return day this excuse for refusing no longer existed. The return filed by the secretary does not show it, but the fact is, and it was conceded on the hearing, that the relator's opponent, W. S. Lauder, was also nominated by the Independent and Democrat party for the same office, and that he had formerly notified the secretary of state of his acceptance of that nomination, and in writing had designated the "Independent and Democrat" column as the column in the official ballot in which he desired his name to appear. This he was authorized to do, under section 491, Rev. Codes. It is clear that thereafter the secretary had no authority to certify down the name of W. S. Lauder as the Republican nominee. After such action, the certificate showing the nomination of the relator was the only one he could act on. It is regular, and, being the only name he could certify, he had no discretion. He was, in my judgment, obliged to certify it. His duty was ministerial and entirely plain. He must look to the certificate filed as the basis of his right and duty to act. In the present case no one contests the right of relator, except the secretary. Relator's opponent for the Republican nomination, Lauder, makes no claim under the Republican certificate filed by him, and does not resist relator's right to have his name certified down as the Republican nominee. Under these circumstances the duty of the secretary to certify it seems free from doubt, and his refusal to do so demands the issuance of the writ prayed for, but does not require a judicial inquiry into the regularity of the party proceedings from which relator's certificate of nomination emanated.

(83 N. W. Rep. 860.)

FRANK KEOGH *vs.* FANNIE P. SNOW.

Opinion filed October 23, 1900.

Appeal—Notice of Judgment—Time of Appeal—Limitations.

Construing section 5605, Rev. Codes 1895, *held*, that notice of an appealable order may be served upon appellant's counsel by delivering to him a copy of such order, and that such service alone is sufficient notice of the order to set in motion the statute limiting the time of appeal. No additional or other notice of the order is required by the statute. But it does not follow that written notice of such an order sufficient to start the statute may not be given without serving the order itself, by a copy thereof or otherwise.

Appeal from District Court, Steele County; *Pollock, J.*

Action by Frank Keogh, trustee, against Fannie Pickert Snow. From a judgment in favor of plaintiff, defendant appeals. Motion to dismiss appeal.

Granted.

J. E. Robinson, for appellant.

Newman, Spalding & Stambaugh, for respondent.

WALLIN, J. This is a motion to dismiss an appeal herein attempted to be taken to this court from an order of the District Court denying a motion to vacate the judgment entered in the District Court. In disposing of the case, we shall have occasion to consider but one of the grounds of the motion. It is the contention of counsel for the respondent that the appeal was not taken until the time limited by statute for an appeal had expired. The time of appeal from orders is governed by section 5605, Rev. Codes 1895. This section provides that an appeal from an order may be taken "within sixty days after written notice of the same shall have been given to the party appealing." We are therefore to inquire in this case—First, whether any written notice of the order attempted to be appealed from was ever given to the appellant; and, if such notice was given, to inquire, secondly, whether the appeal was taken within 60 days thereafter.

The order in question bears date on the 6th days of September, 1899. The presiding judge affixed his signature to the order, and next below said signature we find the following language, indorsed upon the face of the order: "Due and personal service of the above order, by copy, is hereby admitted this 11th day of September, 1899." Next following the above indorsement we find the signatures of the attorneys for the respondent, and likewise the attorney for the appellant. To the signature of the appellant's attorney was appended the following words: "Attorney for Defendant Fannie Pickert Snow," and Fannie Pickert Snow is the only defendant who has sought to appeal from said order.

It is conceded that the notice of this appeal was not served within 60 days after September 11, 1899. It is the contention of the appellant's counsel, however, that a service of the order, made only by a delivery of a copy thereof, is not alone sufficient to set the limitation of time named in the statute in motion. Counsel contend that the statute (section 5605) requires a notice of the order, and that a service of the order itself by copy does not meet this requirement. We cannot sustain this contention. At the same time we are entirely satisfied that a proper notice of an order may be made without serving the order itself, by copy or otherwise. The crucial question here is whether, within the meaning of the statute, an order served by copy constitutes written notice of the order. We are clear that this inquiry should receive an affirmative answer. Section 5216 of the Compiled Laws embraces a provision identical in

meaning with section 5605 of the Revised Codes of 1895. In construing the language of section 5216, the Supreme Court of South Dakota have held that the service of the order itself by copy is alone sufficient, and that no other or different notice of the order is required. See *Brooks v. Bigelow*, 9 S. D. 179, 68 N. W. Rep. 286. The case is squarely in point. In the case cited, as in the case at bar, counsel for the appellant had admitted service of the order. Commenting upon such admission, the court say: "The time when, and the place where, appellant received due notice of the order under consideration are conclusively proven by the written acknowledgment and admission of service." We fully concur in the construction of the statute given in the case cited.

Appellant's counsel cite, as supporting his contention, *McKenzie v. Water Co.*, 6 N. D. 367, 71 N. W. Rep. 608; but that case is not in point. In that case we held that the time of appeal from the order there involved had not run, because the order had not been served, or attempted to be served, in any manner upon the appellant. The service there was not made either upon the appellant or upon his attorney, but was made upon another attorney, who came into the case only to argue a motion in the case, and was not shown to have had any further connection with, or relation to, the action. It is true we said in the headnote to that case: "The right of appeal is a highly valuable right, and, where a party seeks to limit such right, he is held to strict and technical exactness in practice;" and in the body of the opinion we cited cases from several states as illustrative of the strictness of the rule. The cases were not cited in support of our holding in that case, nor are they in point as sustaining plaintiff's contention here, for the reason that they are decisions made upon statutes which are different in their requirements from those contained in the section controlling this case. The cases we cited from New York in *McKenzie v. Water Co.* were based upon statutes requiring, in addition to a notice of the order itself, a further notice of the entry of the order. The statute governing this case contains no such provision, and we certainly are not authorized to read into it any such requirement.

The cases most nearly in point, to which our attention has been called, are based upon appeals taken in New York from the Court of Chancery, and were made before the Code of Civil Procedure was adopted in that state. See *Coal Co. v. Dyett*, 4 Paige, 273; *Jenkins v. Wild*, 14 Wend. 544; *Tyler v. Simons*, 6 Paige, 132; *People v. Spalding*, 9 Paige, 607. These holdings are to the effect that appellant's mere knowledge of an order is not alone sufficient to start the time running, and some of them are to the effect that service of the order itself is alone sufficient to do so.

But counsel further contends that the service of the order upon him was irregular, and therefore that the service should be adjudged to be illegal. We very much doubt whether counsel should be allowed to question the regularity of the service, in view of his unqualified admission of due service thereof, and particularly as there is no

claim that the irregularities complained of operated to mislead counsel or otherwise operate to his prejudice. It seems that the District Court, in conformity to a practice prevailing in that court in such cases, instructed its stenographer to serve the order in question upon counsel, and that, in obedience to such direction, the stenographer served a copy, which was defective in one particular. The paper served was in fact a true copy of the original order, but the original was defective, in that the county was misnamed therein in the caption of the order. It appears that the trial judge promptly discovered this defect, and called the attention of appellant's counsel to the same, and thereupon the original and copy were corrected, and this by the express consent of counsel. We are clear that the defect complained of was entirely inconsequential, and need not have been corrected, and we are further clear that, in view of the unqualified admission of due service, counsel cannot be heard to question the regularity of the service in any respect. The attempted appeal having been taken too late, this court has acquired no jurisdiction of the action; hence the appeal will be dismissed. All the judges concurring.

(83 N. W. Rep. 864.)

STATE, EX REL HANS FOSSEY vs. ANDREW J. LAVIK.

Opinion filed October 26, 1900.

Elections—Refusal to File Certificate of Nomination—Mandamus.

Where a county auditor refuses to receive and file the certificates of nominations for county officers made by a political party entitled to a column upon the official ballot, this refusal is a matter publici juris. It involves the right of the citizen to vote for the nominees of the political party of his faith. It involves the exercise of the elective franchise, and indirectly involves the election of every candidate in that column upon the official ballot. This court has jurisdiction to issue an original writ of mandamus in such a case.

Political Questions—Parliamentary Rulings.

Judicial tribunals cannot pass upon the correctness of parliamentary rulings or tactics adopted in a political convention. Such questions are purely political. Courts can determine in this behalf only whether or not an assembly is a political convention organized as the law requires.

Minority of Convention Cannot Withdraw and Organize a Legal Party Convention.

A political convention is the exclusive judge of the credentials and qualifications of persons claiming to be delegates thereto, and a minority of the delegates, as thus determined by the convention, cannot, by withdrawing from said convention and joining themselves to the persons whose credentials have been rejected by the convention, constitute a legal party convention.

Application for a writ of mandamus, on the relation of Hans Fosser, against Andrew J. Lavik.

Writ granted.

F. H. McDermont, W. J. Maher, (Cochrane & Corliss of counsel),
for relator.

L. N. Torson and P. J. McClory, for respondent.

BARTHOLOMEW, C. J. One Hans Fosser, as relator, made an original application to this court for a writ of mandate to the auditor of Pierce county, commanding said auditor to receive and file a certain certificate of nomination, purporting to be the certificate of nomination for county offices for said Pierce county made by the Republican party of said county, and to print such nominations upon the official ballot. The alternative writ was issued, and upon the return day the defendant, by his counsel, moved to quash such writ on the ground that this court had no original jurisdiction of the case, for the reason that the case was not of such strictly public concern as is required by section 5165, Rev. Codes. It is true, this case involves directly only the nomination and election of county officers, but necessarily and inseparably connected therewith is the right of the citizen to vote for the regular nominees of his political party. It involves the exercise of the elective franchise,—the most sacredly guarded franchise granted by the state. Indirectly, it involves the election of all the candidates named in the Republican column upon the official ballot, whether state, district, or county nominees, for the reason that the number of Republican votes cast in said county will depend to some extent upon who appear in the Republican column as the Republican candidates for the local or county offices. For these reasons, we think the matter is publici juris. As was said in effect in *State v. Nelson Co.*, 1 N. D. 101, 45 N. W. Rep. 33, the court will judge for itself whether the wrong complained of is of the nature that requires the interposition of this court. The motion to quash is denied.

Defendant also answered to the alternative writ. From the writ and answer it is clear that when the Republican county convention of Pierce county convened in said county on September 29, 1900, it was composed of two factions, bitterly opposed, and the ultimate result was a division; each faction claiming to be the Republican county convention, and each nominating a full list of county officers. The certificate of nomination as made by one faction was duly presented to, and received and filed by, the auditor. Subsequently the certificate of nominations as made by the other faction was presented to the auditor, but he refused to receive the same upon the ground that the certificate of nominations made by the Republican county convention was already on file. It is clear that the one duty of the court in this case is to determine which faction, if either, constituted the *de facto* Republican convention. It is not our province to correct parliamentary errors, or to scrutinize the parliamentary methods by which an organization of a convention was secured, if only an organization of the Republican county convention was effected. A mass of affidavits has been presented to us, but we accept the statement of facts as found in defendant's brief, adding thereto

only matters that are undisputed. The call for the convention was regular in all respects, and fixed the total number of delegates from the county at 19. The caucuses were duly held, and delegates properly elected from all the precincts except one. In that precinct one Dolan was elected, not by ballot, as required by section 497a, Rev. Codes, but by a *viva voce* vote of the electors present. On the day appointed for the convention the county Republican central committee met, in pursuance of usage, to determine what delegates were entitled to participate in the preliminary organization. That committee rejected Dolan's credential,—whether rightly or not, we must not inquire. The delegates were called to order by the chairman of the central committee, and, on the nomination for temporary chairman, there was a tie vote of 9 to 9. The chairman of the central committee assumed the right to decide the tie,—whether rightly or not, we need not say, because the election of the temporary chairman was immediately acquiesced in by the entire convention. A temporary secretary was then nominated and elected by the unanimous vote of all the delegates. It is clear at this point that a temporary organization of the convention had been effected. The assembly was no longer an unorganized body of delegates. It was a convention. Whatever business that convention might transact must be transacted through the instrumentality of the organization thus effected, or of some organization that might by a vote of the convention as thus organized be substituted for the then existing organization. The convention, acting upon these self-evident propositions, at once proceeded with the appointment of the usual committees for such occasions. There was no contest, except as to the committee on credentials. Upon the motion that the chair appoint such committee, the vote stood 9 to 9; and the chair, after having voted as a delegate, assumed the right, as chairman, to vote again, and decide the vote in favor of the motion. We need not waste a moment in condemning this course. This court is not interested in determining whether or not that convention was conducted according to strict parliamentary rules and usages. Such questions are foreign to the powers of judicial tribunals. They are political, purely. We are interested only in determining whether or not such convention was the Republican county convention, and as to that there can be no doubt, upon conceded facts. The committee on credentials presented a report rejecting the credentials of Mr. Dolan, who had already been rejected by the central committee, and also rejecting the credentials of one McDonough. The motion to adopt this report was carried by a vote of 9 in the affirmative to 8 in the negative; the chair refusing to count the vote of McDonough in the negative. That convention was the exclusive judge of the qualifications of its own members, and by that vote it conclusively determined that there were 17 qualified delegates elected to that convention, and no more, and that Dolan and McDonough were not delegates legally elected and qualified to sit in said convention. When this was definitely determined, the 8 delegates, who were thus left a minority

faction, and all of whom had participated in the preliminary organization and in every move of the convention up to this point, without any motion to adjourn, or any public announcement of any intention to withdraw, quietly left the room, and, calling to them the 2 men who had been rejected by the convention, they proceeded to another room, and assumed to organize themselves into a convention, and nominated a full list of county officers; and the parties who acted as chairman and secretary of such assumed convention executed a certificate of nomination, fair on its face, and purporting to be the nominations made by the Republican county convention for the offices therein specified. The certificate was received and filed by the auditor. The 9 delegates remaining in the regular convention, and being a majority of the delegates entitled to seats in that convention, proceeded to nominate county officers; and a certificate of such nomination, fair on its face, and purporting to be the certificate of nominations made by the Republican county convention for said Pierce county, was presented to the auditor, who refused to receive or file the same, for the reason that the certificate of nominations made by the Republican county convention was already on file in his office. True it is that the auditor could properly receive and place upon the official ballot but one list of Republican nominations for county offices, but he was bound to so receive and place upon the ballot the nominations made by the regular Republican county convention. *State v. Falley*, 9 N. D. 450, 83 N. W. Rep. 860. This he has refused to do. Let the peremptory writ issue as prayed. All concur.

(83 N. W. Rep. 914.)

STATE EX. REL. WILLIAM J. ANDERSON vs. FRED FALLEY.

Opinion filed October 26, 1900.

Certificate of Nomination Must Designate Office.

Section 499, Rev. Codes, requires certificates of nomination to designate the particular office for which the person named in the certificate was nominated, and a certificate not complying with that provision cannot properly be filed by the secretary of state.

Time of Filing Certificate of Nomination.

Section 503, Rev. Codes, requires certificates of nomination to be filed with the secretary of state not less than 30 days before election. A certificate filed 29 days before election cannot be legally filed by the secretary. The statute is mandatory.

When Last Day Falls on Sunday—Effect.

The fact that the thirtieth day before election fell on Sunday will not change this rule. Section 5127, Rev. Codes, relating to excluding holidays, has no application to a case of this kind.

Application, on the relation of William James Anderson, for mandamus against Fred Falley, secretary of state.

Writ quashed.

Bosard & Bosard, for relator.

Cochrane & Corliss, for respondent.

BARTHOLOMEW, C. J. This is an original application to this court for a writ of mandamus commanding the defendant, as secretary of state, to certify the name of relator to the auditors of the counties composing the First judicial district, to be placed in the Republican column on the ballot to be voted at the general election to be held on November 6, 1900. The alternative writ was issued, and the affidavit of relator, upon which the writ was asked, was attached to and made a part of the writ. It will be unnecessary to set out the facts in *extenso*. We recite only sufficient to explain our ruling. On October 6, 1900, a paper purporting to be a certificate of nomination of relator was received at the office of the secretary of state. This certificate was duly verified on August 8, 1900, by the parties claiming to be the chairman and secretary of the convention making the nomination. But the certificate failed to state for what purpose the convention making the nomination was called, or for what office relator was nominated. On said October 6th the secretary of state returned said certificate to the said chairman of said convention, pointing out by letter the defects above stated. On October 8, 1900, said certificate was received by said chairman at Grand Forks, and on that day was changed by interlining the missing averments, and returned by registered mail to the secretary of state, and was received at Bismarck on October 10, 1900. It was not verified after it was amended, nor is it shown that the secretary of the convention ever saw it after the verification on August 8th. The secretary of state refused to treat it as a certificate of nomination or to certify the relator's nomination to the proper county auditors.

Upon the return of the alternative writ, the defendant moved to quash the same on the ground that the facts set forth in relator's affidavit did not justify the issuance of the writ. This motion must be sustained. Section 499, Rev. Codes, contains this language: "The certificate of nomination, which shall be in writing, shall contain the name of each party nominated, his postoffice address, and the office for which he is named." The designation of the office is matter of substance, and not a mere formal matter, like the address. Unless the office be named, the secretary cannot certify the name to the county auditors, because its place upon the ticket could not be fixed. In *Lucas v. Ringsrud*, 3 S. D. 355, 53 N. W. Rep. 426, it is said: "The first certificate of the nominations made by the Prohibition party, as shown by the exhibit, is clearly insufficient, because it fails to give the residence or business address of any of the officers purported to be nominated, and it also fails to state the places of residence, the business, and business addresses of the presiding officer and secretary of the convention or primary meeting at which such nominations were made, and was therefore

properly rejected. What the certificate of nomination shall contain is plainly stated in the statute, and any one who wishes to avail himself of the benefits of this law must substantially comply with its requirements. Until this is done, the secretary of state is justified in refusing to place such a document on file." Under this decision, as well as under the express words of our statute, the certificate, when first presented, was clearly insufficient, and the secretary could not receive or file the same. When the amended certificate was presented, granting that it was, in law, presented when placed in the registered mail at Grand Forks, it was too late. Section 503, Rev. Codes, declares: "Certificates of nomination to be filed with the secretary of state shall be filed not less than thirty days before the day fixed by law for the election of the persons in nomination." This time limit has been held mandatory by every court that has ever passed upon a similar statute, so far as we can ascertain. See *Lucas v. Ringsrud*, supra; *State v. Piper* (Neb.) 69 N. W. Rep. 383; *Hallon v. Center* (Ky.) 43 S. W. Rep. 174; *In re Cuddeback* (Sup.) 39 N. Y. Supp. 388.

The date of the election was November 6, 1900. The amended certificate was placed in the mail October 8, 1900. Excluding the latter date, and including the day of election, the certificate was mailed 29 days before election. Under a mandatory statute, a default of 1 day is as fatal as a default of 20 days. True, the thirtieth day preceding the day of election was Sunday, and a legal holiday, under section 5124, Rev. Codes; and section 5127, Id., reads: "Whenever an act of a secular nature, other than a work of necessity or mercy, is appointed by law or contract to be performed upon a particular day, which falls upon a holiday, such act may be performed upon the next business day with the same effect as if it had been performed upon the day appointed." But this section has no application to the performance of the act under consideration. As the general election always falls on Tuesday, it follows that the thirtieth preceding day is always the fifth preceding Sunday. It is not a case where the date may or may not fall upon Sunday. The date must fall on Sunday every time. If we say the holiday provision must apply to this time limitation, then the legislature fixed a limit of 30 days, well knowing that it must be 29 days in every instance. That would seem absurd. But the terms of section 5127 exclude this limitation. That section says that when an act is appointed "to be performed upon a particular day," etc. But this act is not appointed for a particular day. It must be done not less than 30 days before election. But there is no limit to the extension of this time. The certificate may be filed any number of days exceeding 30 before the election. If the limitation declared that the certificate must be filed on the thirtieth day before election, then the statute would apply. But the distinction seems very clear. The Supreme Court of California has placed the same construction upon an identical statute under practically the same facts. *Griffin v. Dingley*, 46 Pac. Rep. 457. When the amended certificate was

presented, the secretary was without authority to file it, and hence he cannot be required to certify the nomination therein contained. The alternative writ of mandamus heretofore issued in this case is quashed. All concur.

(83 N. W. Rep. 913.)

E. C. TOURTELOT, AS RECEIVER, vs. H. L. WHITHED, AS ASSIGNEE.

Opinion filed October 16, 1900.

Appeal—Trial De Novo.

This case being triable de novo in this court, the fact issues, on full consideration of the evidence, are resolved in favor of respondent.

Insolvent Banks—Application of Deposits.

Where, at the time a national bank was placed in the hands of a receiver, another corporation had on deposit therein a certain sum of money, and was also liable to the bank on distinct contracts, such other corporation had the right to direct the application of the money so on deposit.

Authority of Bank President.

Where the members of the board of directors of a bank have for months ceased to exercise the functions of their offices, and have abandoned the management and control of the corporation business entirely to the president of the bank, it will be presumed that such officer was authorized to do, in the name of the bank, whatever the bank might lawfully do, and no special authorization or ratification of his acts need be shown.

Incidental Powers of Banking Corporations—Taking Corporate Stock in Payment of Debt to Bank.

A contract by the terms of which a national bank receives corporate stock of another corporation in payment of a debt owing to the bank by such other corporation is not ultra vires as to the bank when, at the time of making the contract, such corporation is financially embarrassed, and unable to meet its commercial obligations as they mature. Such contract is directly incidental to the proper exercise of the powers for which the bank was chartered.

Ultra Vires Contract When Performed May Not Be Declared Void at Suit of Either Party to it.

A contract of a corporation that is ultra vires, not because prohibited by positive law, or inherently vicious, and not because the corporation could not, under any circumstances, make the contract, but solely because of the existing circumstances and conditions under which it was made, is never void, and the plea of ultra vires will not avail either party to such contract when the contract has been fully executed by the other party.

Appeal from District Court, Grand Forks County; *Fisk, J.*

Action by E. C. Tourtelot, receiver of the Grand Forks National Bank, against H. L. Whithed, assignee of the North Dakota Milling Company. Judgment for defendant, and plaintiff appeals.

Affirmed.

Tracy R. Bangs, for appellant.

Section 5136 and succeeding sections of the Revised Statutes constitute, with the acts since passed, a complete code of laws for the government of banking associations. *Logan County Bank v. Townsend*, 139 U. S. 67, 11 Sup. Ct. Rep. 496; *California National Bank v. Kennedy*, 167 U. S. 365, 17 Sup. Ct. Rep. 831, 42 L. Ed. 200. The dealing in stocks by national banks is entirely outside of the powers conferred upon these corporations and is not banking business. *California National Bank v. Kennedy*, 167 U. S. 362; *Bank v. Hart*, 38 Neb. 666, 26 L. R. A. 780. Such transactions in stocks of other corporations are void and *ultra vires*. *Morowetz, Corp. § 433*; *Thompson, Corp. § 5719*; *Franklin County v. Lewiston*, 28 Am. Rep. 9; *Buckeye Marble Co. v. Harvey*, 19 L. R. A. 252, n., 20 S. W. Rep. 427; *Miller v. Ins. Co.*, 20 L. R. A. 765, 21 S. W. Rep. 39; *Franklin Bank v. Commercial Bank*, 36 Ohio St. 350, 38 Am. Rep. 594; *Hotel Co. v. Schran*, 32 Pac. Rep. 1002; *German Bank v. Wulfekuhler*, 19 Kan. 60; *Knowles v. Sandercock*, 40 Pac. Rep. 1047; *Central Ry. Co. v. Pennsylvania Co.*, 31 N. J. Eq. 475; *Barry v. Yates*, 24 Barb. 199; *Valley Co. v. Iron Works*, 46 Ohio St. 40, 18 N. E. Rep. 486; *Easum v. Buckeye*, 51 Fed. Rep. 156; *People v. Gas Trust*, 130 Ill. 268, 22 N. E. Rep. 798; *Milbank v. Ry. Co.*, 64 How. Prac. 20. A contract which is *ultra vires* as being beyond the powers conferred upon it by the legislature is not voidable only, but wholly void. *Miller v. Mutual Accident Ins. Co.*, 20 L. R. A. 769; *Central Transportation Co. v. Pullman Car Co.*, 139 U. S. 59, 35 L. Ed. 68; *McCormick v. National Bank*, 165 U. S. 550, 41 L. Ed. 821. In dealing with corporations all persons are bound to take notice, at their peril, of the extent of the powers of such corporation. *Reese, Ultra Vires*, § 53; *Franklin v. Sav. Inst.*, 68 Me. 43, 28 Am. Rep. 9; *Kraniger v. Building Society*, 60 Minn. 94, 61 N. W. Rep. 904; *Hayden v. Fire Ass'n.*, 80 Va. 683; *Bailey v. Gas Co.*, 27 N. J. Eq. 196. The contract, by means of which the bank became possessed of this stock, and under which it surrendered the promissory notes of the milling company, was void. It was the duty of the bank to disaffirm the contract, and it became the duty of the bank's receiver to disaffirm the stock trafficking transaction and to sue for a restoration of its original property rights. *Thomas v. Ry. Co.*, 101 U. S. 71; *Miller v. Ins. Co.*, 20 L. R. A. 765; *Railroad Co. v. Bridge Co.*, 131 U. S. 389; *Central Transportation Co. v. Pullman Car Co.*, 139 U. S. 60; *Parkersburg v. Brown*, 106 U. S. 487, 27 L. Ed. 245; *Pratt v. Short*, 79 N. Y. 437; *Ohio Life Ins. Co. v. Trust Co.*, 11 Humph. 1; *Gas Light Co. v. Gas Co.*, 85 Me. 541; *Miller v. Ins. Co.*, 20 L. R. A. 765; *Greenville v. Compass Planters Press*, 35 Am. St. Rep. 683, n.; *Reese, Ultra Vires*, § 74; *Twiss v. Loan Ass'n.*, 87 Ia. 733; *Dav v. Buggy Co.*, 57 Mich. 146; *Anthony v. Sewing Machine Co.*, 5 L. R. A. 575.

Templeton & Rex, for respondent.

The stock of the milling company was not received by the bank as security but in payment of the debt, and having been so re-

ceived by the bank the transaction was not *ultra vires*. The bank had the right to become the owner of the stock in payment of a debt, though it may not have had the right to purchase the stock as an original investment of its funds. *First National Bank v. National Exchange Bank*, 92 U. S. 122, 23 L. Ed. 679; *Germania National Bank v. Case*, 99 U. S. 620, 25 L. Ed. 448; *People v. Gas Trust*, 130 Ill. 268-283; *Deposit Bank of Owensborough v. Barrett*, 13 S. W. Rep. 337; *Thomp. Corp* § 5719; *Howe v. Boston Carpet Co.*, 16 Gray 493; *Miners Ditch Co. v. Zellerbach*, 37 Cal. 543; *Holmes & Griggs Mfg. Co. v. Holmes, Etc. Co.*, 127 N. Y. 252; *Ellerman v. Chicago Junction Ry. Co.*, 49 N. J. Eq. 217-250, 23 Atl. Rep. 287-299. No action of the board of directors of the bank was necessary to empower Booker, as president, to accept the stock in payment of the milling company's debt. The directors had ceased to exercise any management or control over its affairs and had abandoned the entire management and control to Booker, the president. Under such circumstances Booker was in legal contemplation, the corporation, the bank, and had the same powers that the directors themselves had. *Washington Savings Bank v. Butchers' and Drovers' Bank*, 17 S. W. Rep. 644; *Kraniger v. People*, 60 Minn. 94, 61 N. W. Rep. 904; *Simons v. Fisher*, 55 Fed. Rep. 905; *U. S. Bank v. First National Bank*, 79 Fed. Rep. 296; *State National Bank v. Chemical National Bank*, 80 Fed. Rep. 859; *Cocks v. Robinson*, 82 Fed. Rep. 277-283.

Cochrane & Corliss, for respondent.

That a national bank may take stock in payment of or security for indebtedness is well settled. *Fleckner v. Bank*, 8 Wheat. 351; *Bank v. Bank*, 92 U. S. 122; *Boyd v. Bank*, 22 Am. Rep. 35; 1 Morse, Bank'g, § § 60, 77 and 78; *Bank v. Bank*, 51 How. Prac. 320; *Howe v. Boston Carpet Co.*, 16 Gray, 493; *McCraith v. Bank*, 10 N. E. Rep. 862; *Bank v. Bank*, 39 Md. 611; *H. & G. M. Co. v. Co.*, 127 N. Y. 252, 3 Am. & Eng. Enc. L (2d Ed.) 798, 799; *Anderson v. Bank*, 5 N. D. 451, 454. The evidence shows that before the transaction in question took place the directors of the bank had utterly abandoned the affairs of the bank and left all of its affairs in the exclusive charge of Booker, its president. Under such circumstances Booker was, for all purposes, the board of directors and had the power which the board had, and therefore which the corporation itself possessed. *Wing v. Bank*, 61 N. W. Rep. 1009, 1013; *Davenport v. Stone*, 62 N. W. Rep. 723; *Martin v. Webb*, 110 U. S. 7; *Armstrong v. Bank*, 83 Fed. Rep. 571; 1 Morse, Bank'g, § 343. In view of the conflict of authority and of the qualified doctrine established by some of the courts permitting a corporation to purchase its own stock under certain conditions, and of the fact that other courts deny the power altogether, (see note 33 Am. St. Rep. 399, 345), it is obvious that § 2880, Rev. Codes of this state was framed for the express purpose of fixing the exact limits of such corporate power in this jurisdiction. *Adams, Etc. Co.*

v. *Deydette*, 59 Am. St. Rep. 751, 756. If a corporation may buy its own stock, or make a valid agreement to buy it, in this indirect way, its stock may be diminished and destroyed and the policy of the statute which is protection to the public, be entirely defeated. *Trevor v. Whitworth*, 12 App. Cas. 409; 2 Thomp. Corp. § 5024; *Coppin v. Greenless*, 38 Ohio St. 275. The statute guards against the distribution of capital stock among the stockholders. § 2891, Rev. Codes. And yet this is precisely what is done when stockholders are allowed to sell their stock to the corporation. The agreement on the part of the company to buy back its own stock was therefore *ultra vires*, and being executory no claim for damages, based thereon, can possibly exist. *Adams, Etc. Co. v. Deydette*, 59 Am. St. Rep. 754. The capital stock of a corporation is a trust fund. 2 Thomp. Corp. § 1569; *Hamor v. Taylor*, 84 Fed. Rep. 395; *Sawyer v. Hoag*, 17 Wall. 610. Therefore, if a stockholder may, by a secret agreement with the corporation, place himself in a position where, in the event the corporation becomes insolvent, he may become a creditor of the corporation and cease to be a stockholder therein, all of the stockholders may make such an agreement and upon the insolvency of the corporation the creditors instead of having a corporate stock as assets out of which to collect their claims would find the stockholders to be creditors of the corporation. Agreements to transmute stockholders into creditors can not be enforced at the expense of other creditors. *Adams, Etc. Co. v. Deydette*, 59 Am. St. Rep. 751; *Buck v. Ross*, 57 Am. St. Rep. 60; *Heggie v. Peoples*, 107 N. C. 581; *Bent v. Hart*, 10 Mo. App. 143; *Fraser v. Ritchie*, 8 Ill. App. 554; *Clapp v. Peterson*, 104 Ill. App. 26; *Bank v. Burch*, 33 Am. St. Rep. 331; *Hamor v. Taylor*, 84 Fed. Rep. 393; *Atwater v. Stromberg*, 77 N. W. Rep. 963; *Atwater v. Smith*, 76 N. W. Rep. 253; *Columbian Bank's Estate*, 147 Pa. St. 422; *Buck v. Ross*, 57 Am. St. Rep. 60; *Wilbur v. Stoepel*, 46 N. W. Rep. 724. It is not important to show that there was any design to defraud, however innocent the transaction may be, if the effect of the sale or of enforcing the sale is to prejudice creditors, the sale is illegal. *Clapp v. Peterson*, 104 Ill. 26; *Bank v. Burch*, 33 Am. St. Rep. 334. After the bank had purchased the stock it was no longer the creditor of the company, but was a stockholder therein. *Yeaton v. Eagle, Etc. Co.*, 29 Pac. Rep. 1051.

BARTHOLOMEW, C. J. In the year 1888 the Grand Forks National Bank was duly organized, and commenced business as such national bank at the city of Grand Forks, in this state. In 1896 said bank became insolvent, and the comptroller of currency took possession of its assets, and on August 6th of said year E. C. Tourtelot, the plaintiff and appellant herein, was placed in charge of the assets of said bank as receiver, and it is in that capacity that he brings this action. Some time prior to the year 1891 the North Dakota Milling Company was duly organized as a corporation under the laws of this state. In April, 1897, the said milling company made a general assignment for the benefit of creditors to the defendant and respondent, H. L.

Whithed. This action was brought to compel the allowance and the pro rata payment by the assignee of alleged claims held by the said bank against the said milling company, aggregating \$14,000, and the accrued interest thereon. These claims were presented to the said assignee, and were by him disallowed except in the sum of \$2,985.83. This action of the assignee was sustained by the trial court, and the plaintiff appeals.

In 1891 the milling company borrowed from said bank the sum of \$10,000, giving its promissory notes therefor. These notes were renewed from time to time. Subsequent loans were also obtained at the bank. The milling company at one time was indebted to the bank in the sum of \$20,000. By means obtained from a loan made elsewhere the milling company reduced this sum to \$14,000. The complaint alleges that on September 4, 1894, the milling company executed and delivered to the bank its two promissory notes for \$2,500 each, due December 1, 1894, and that on October 9, 1894, it executed and delivered to the bank its further promissory note for the sum of \$5,000, due December 9, 1894. It is conceded that these notes were renewals of the pre-existing indebtedness. There was also another note of \$4,000. As to the three notes first above mentioned, and aggregating the sum of \$10,000, it is the contention of respondent that the indebtedness thus represented was paid and discharged on November 4, 1894, by the sale and transfer to the bank of preferred stock in the milling company in the amount of \$10,000. The appellant admits that this stock was received by the bank, but contends that it was received as collateral security for said indebtedness, and not in satisfaction thereof. This is the first question of fact upon which this court must pass. As to the other note of \$4,000, which was executed October 29, 1895, and payable on demand, the liability thereon is not disputed, but the respondent seeks to set off against such liability the sum of \$1,014.17, which the milling company had on deposit in the bank at the time it went into the hands of the receiver. The appellant contends that such sum was not on deposit, for the reason that by the memorandum check of its cashier, and with the knowledge and consent of the milling company, the bank had appropriated \$1,000 of such sum in payment of the interest of the \$10,000 indebtedness, or of dividends upon the preferred stock. The respondent insists that the milling company never assented to such appropriation, but, on the contrary, expressly repudiated and rejected the same. This raises the second question of fact for our determination.

Some further statement of facts and reference to the evidence will be necessary to explain our conclusion. The capital stock of the milling company was originally \$100,000. It had more money invested in its plants than the amount of its capital stock. This excess was borrowed money, upon which it was paying, so far as the record shows, 10 per cent. interest. The sum thus borrowed was \$55,000. Its business in the fall of 1894 was not prosperous. It could not meet its demands as they matured, and it desired to get

cheaper money. In view of these facts the officers of the milling company conceived the plan of improving the credit of the company by increasing the capital stock by the issuance of \$55,000 of preferred stock, and the exchange thereof for such indebtedness for borrowed money. The reasons for this action are thus stated by the president of the company in his testimony in this case: "The company had more money invested in different plants than its capital amounted to, and could not, therefore, pay their obligations without selling some of their property that was necessary to have to operate; and it was essential that they have more money in capital. They had borrowed money,—I think about \$55,000,—and they could not pay it. If they paid it, they would have had to quit business, and it came to a point where it was advisable to make it capital stock instead of bills payable, because they could not pay it and continue business." The preferred stock was issued, and a certificate for 100 shares of \$100 each was delivered to the bank. Among the indorsements on said certificate was the following: "That the holders of preferred stock shall be entitled to priority of dividends at the rate of eight per cent. per annum, to be paid from the earnings of the company; such dividends to be cumulative, and no dividends to be paid on the common stock until all dividends on the preferred stock, past and current, shall have been fully paid." When the certificate of stock was delivered to the bank, there was also delivered the written agreement known in this case as "Exhibit 1," and which reads as follows: "This agreement witnesseth that whereas, the Grand Forks National Bank has purchased one hundred shares of the preferred stock of the North Dakota Milling Company, par value \$10,000, and paid therefor by canceling and delivering to said North Dakota Milling Company its notes for \$10,000 which have been held by said bank: Now, in consideration of the aforesaid, said North Dakota Milling Company agrees with said Grand Forks National Bank that the dividend on said stock shall equal ten per cent. per annum while held by said bank; and said milling company further agrees to find a purchaser for said stock on or before November 1st, 1895, and with the proceeds of said sale pay to said bank the sum of \$10,000 and accrued dividends at the rate of ten per cent. per annum, in exchange for said preferred stock. In witness whereof said milling company has hereunto set its hand and seal of the corporation this third day of November, 1894. North Dakota Milling Co., by George B. Clifford, Prest. E. Mapes, Sec. (Seal.)" At the same time the three notes aggregating \$10,000 were delivered by the bank to the milling company, and the account of "bills receivable" on the books of the bank was credited with \$10,000, and the account of "stocks, claims, and securities" was charged with \$10,000. The managing officers of both corporations concede that the contract above quoted correctly states the agreement between the parties, but they differ as to the real meaning of the contract. The appellant, on the theory, we presume, that the contract was ambiguous, introduced the testimony of the president of the bank, under objection as to its competency,

showing certain conversations that preceded the making of the contract, as bearing upon its meaning, and as to what the parties intended. Under elementary principles, such evidence was incompetent. The contract is neither ambiguous nor uncertain as to its terms. The contract in terms declares that the bank "has purchased one hundred shares of the preferred stock," etc., and has "paid therefor by canceling and delivering to said North Dakota Milling Company its notes for \$10,000, which have been held by said bank." The absolute extinguishment of the debt represented by the notes in payment of the purchase price of the stock could not be more emphatically asserted. Nor are we at all clear that the president of the bank intended to state otherwise. It is clear that he well knew that one of the objects of the milling company in issuing the preferred stock was to enable it to make a statement to Eastern capitalists that would show a reduced floating indebtedness. If he supposed that the indebtedness should continue in fact, but disappear from the statement, then he at once became a party to a fraud. Such was not his intention. The remainder of the contract shows what he meant by saying in effect that the relations of the parties were not changed by the transaction. The ultimate outcome was not affected. It never was the intention that the bank should hold the stock as a permanent investment. The milling company agreed to pay an annual dividend of 10 per cent. on the stock, and to find a purchaser for the stock within a year, and pay the bank \$10,000, not on the old debt, but "in exchange for said preferred stock." Thus the bank would receive its money and 10 per cent. interest thereon. But the old indebtedness was gone, and in lieu thereof the bank was the owner of the stock, with a virtual contract to repurchase at its face value on the part of the milling company. There would be no liability upon that contract until a breach thereof. But neither the liability upon that contract nor its legality is in any manner involved in this case. Appellant seeks to establish the old indebtedness as represented by the canceled notes. If the contract already set forth was a valid contract, that debt was extinguished, and the trial court rightly so held.

We are equally clear that the trial court was correct in holding that the deposit of the milling company in the bank at the time it went into the hands of the receiver had never been paid, in whole or in part, to the milling company or its assignee. Of course, an appropriation of the money in payment of a debt of the milling company with the consent of such company, would have been a payment to it. There is, to some extent, a conflict in the testimony on this point. No benefit would accrue from its discussion. We are all agreed that the trial court correctly ruled.

But, conceding that by the stock transaction contract already discussed it was intended to extinguish the original indebtedness to the extent there specified, and that the bank should actually purchase the stock, appellant contends that such stock contract on the part of the bank was *ultra vires* and void, and that it is his duty to

proceed as if such contract had never been made, and such notes never canceled. This is the difficult question in the case. A preliminary point is made to the effect that the purchase of corporate stock is not within the ordinary powers and duties of bank officers, and hence not valid, unless authorized or ratified by the board of directors; and no such authorization or ratification has ever taken place. To this respondent replies that the transaction was at once spread upon the books of the bank, where the directors were bound to take notice of it, and their long acquiescence amounts to a ratification. We pass this without a ruling, as we prefer to rest our decision of the point upon the second position taken by respondent. It is undisputed that when that contract was made, and for months prior thereto, the members of the board of directors of said bank had ceased to exercise the functions of their offices, or to take part in the management of the affairs of the bank. The whole control and management of its affairs was then, and for months had been, in the hands of the president. It was by and through him that this stock contract was made. Where the entire control of the affairs of the corporation has been thus abandoned to one of its officers, it will be presumed that he is authorized by the corporation to do any act that the corporation might lawfully do, and the acts of such officer in transacting the business of the corporation need no authorization or ratification from a nominal board of directors. *Cox v. Robinson*, 27 C. C. A. 120, 82 Fed. Rep. 277; *Washington Sav. Bank v. Butchers' & Drovers' Bank*, 107 Mo. 134, 17 S. W. Rep. 644; *Kraniger v. Society*, 60 Minn. 94, 61 N. W. Rep. 904; *Martin v. Webb*, 110 U. S. 7, 3 Sup. Ct. Rep. 428, 28 L. Ed. 49; *Calvert v. Stage Co.*, 25 Ore. 412, 36 Pac. Rep. 24; *Cceder v. Lumber Co.*, 86 Mich. 541, 49 N. W. Rep. 575; *Thomp. Corp.* § 4883. We think the bank was bound if the contract was not *ultra vires*.

In connection with the validity of the contract appellant makes a vigorous assault upon the ninth finding of the trial court, which reads: "That on said 3d day of November, 1894, said North Dakota Milling Company was financially embarrassed, and unable to meet its obligations." The reason for this assault lies in the fact that appellant concedes that the powers of a bank in adjusting disputed or doubtful claims are much broader than in adjusting claims that are undisputed in amount and certain of collection. In this case the amount of the original indebtedness was undisputed, and appellant insists that its collection was not doubtful. It is true that in the financial statement prepared by the officers of the milling company, after preferred stock to the amount of \$55,000 had been issued, and a corresponding amount of bills payable retired therewith, showed assets equal to liabilities, including the \$155,000 capital stock. But such statement showed outstanding bills payable and book accounts amounting to \$79,460.53, while its bills receivable and book accounts in its favor and cash on hand amounted to only \$40,205.04. The column of assets was also swelled by the item of profit and loss to the extent of \$42,823.60. But, granting that the assets of the milling

company were ample to meet all its obligations aside from liability to stockholders; the fact yet remains that it was insolvent in the sense that it then was, and for some time had been, unable to meet its commercial obligations as they matured. This, under the evidence, cannot be questioned. It is shown that for some time after its creation the milling company was a very profitable concern. Later the profits became less, and finally business was done at a loss. Doubtless those interested believed that by obtaining money for present necessities the concern could be restored to a basis of profit. The fact that a 10 per cent. dividend was guaranteed by one party, and that the guaranty was accepted by the other party, shows that such was the expectation. But that did not change the fact that the milling company was at that time financially embarrassed, and unable to meet its obligations, and any attempt to enforce a large claim against it would necessarily disappoint such expectations, and at once force an assignment. It must be remembered that the bank had been carrying that loan on short-time renewals for more than three years. The stringent times of which counsel for appellant speaks had arrived, and, as he says, the bank was "struggling for existence;" in other words, making every effort to convert its assets into cash. Yet it had just renewed those notes for 60 and 90 days. Counsel says "voluntarily," as showing the solvency of the milling company. Is it not much fairer, in view of the testimony, to say that they were renewed because the president could not see his way clear to collect them, and did not wish to carry overdue paper among the assets of the bank? In measuring the power of the bank, or, what is the same thing in this case, the power of the president to deal with this claim, we think it should be viewed in this light. It would be to the advantage of the bank if its debtor could be again placed upon a money-earning basis, and, if this could be done by delivering up the notes, and taking in their stead property from which it would ultimately realize the same amount of money that it would receive were the notes paid in full, then clearly it was to the interest of the bank to do so. The transaction was an absolute purchase, under the conditions stated, by the bank, of the preferred corporate stock, and the consideration paid therefor the extinguishment of the debt of the milling company to the extent of \$10,000. Was the contract *ultra vires*? Section 5201, Rev. St. U. S., prohibits a national bank from making any loan or discount on the shares of its own stock except under certain specified and stringent conditions. Counsel argues from this that it was the purpose of Congress to inhibit the purchasing or holding by national banks of corporate stocks except under the conditions named. We do not think this inference necessary. There are objections to permitting a corporation to purchase or hold its own stock that do not apply to stock of other corporations. The capital stock is a trust fund, to which creditors may always look with confidence. The law will not sanction any impairment of that fund. In speaking of the purchase by a corporation of shares of its own stock, it is said in Morawetz

on Corporations (volume 1, § 112): "There is no substitution of membership under these circumstances, as in case of a purchase and transfer of shares to a third person, but the members of the company and the amount of its capital are actually diminished. Whatever a transaction of this character may be called in legal phraseology, it is clear that it really involves an alteration of the company's constitution, just as the withdrawal of a member of a co-partnership with his proportionate share of the joint funds involves an alteration of the constitution of a co-partnership. The amount of the company's assets and the number of its shareholders are diminished. Every continuing shareholder is injured by the reduction of the fund contributed for the common venture; and the creditors who have trusted the company upon the security of the capital originally subscribed, or who are entitled to expect that amount of security, are entitled to complain." But no such results follow the purchase of the stock of any other corporation, and the analogy claimed by counsel cannot be sustained. See *Adams & Westlake Co. v. Deyette*, 8 S. D. 119, 65 N. W. 471, 31 L. R. A. 497. Much reliance is placed by appellant upon the case of *Bank v. Kennedy*, 167 U. S. 362, 17 Sup. Ct. Rep. 831, 42 L. Ed. 198. That appears to have been a case where the officers of a national bank proceeded to organize a savings bank. All the stock of such savings bank was issued to such officers of the national bank or to the bank. The savings bank failed, and in an action against it by a creditor the national bank was made a party defendant, as being liable, under the California statute, for a share of the indebtedness in proportion to the amount of stock of the savings bank held by it. The court held, upon what would seem to be clear provisions of elementary law, that the national bank as such had no power to take or hold the savings bank stock under the circumstances stated. It was not taken as security for an indebtedness, or in payment of an indebtedness, or in any manner directly or incidentally connected with the transacting of banking business, for which alone the national bank was organized. It was simply a speculative investment. This is made clear by the language of Mr. Justice White, who wrote the opinion of the court. He says: "The circumstance that the dealing in stocks by which, if at all, the stock of the California Savings Bank was put in the name of the California National Bank, was one entirely outside of the powers conferred upon the bank, and was in no wise the transaction of banking business, or incidental to the exercise of the powers conferred upon the bank, distinguishes this case from the class of cases relied upon by the defendant in error." The propriety of permitting the national bank to retain the shares of stock of the savings bank, and the dividends that it had received thereon, and at the same time repudiate its liability as a stockholder, seems not to have been discussed or considered in the case; the court contenting itself with the distinction that, as the act of the national bank in receiving the stock was absolutely void, no estoppel could be based thereon. The case of *Bank v. Hart*, 37 Neb. 197,

55 N. W. Rep. 631, 20 L. R. A. 780, is not really different in principle from the last case. There the bank cashier purchased stock in an insurance company, and agreed to credit the purchase price on a note held by the bank against the vendor. It was held that the act was beyond the scope of the powers of the cashier, and could not be ratified by the board of directors. It does not appear that the note upon which the credit was to be made was mature, or that the maker was not abundantly able to meet it when due. It appears simply as a voluntary investment for speculative purposes. The court in this opinion says: "An emergency might arise when a bank's board of directors would be justified in taking the stock of another corporation in settlement, adjustment, or compromise of a doubtful claim or debt, acting in the honest belief that only by so doing could a serious loss to the bank be averted." Neither of these cases necessarily requires a reversal of this case.

The real point in controversy, as we conceive it, is this: Had the Grand Forks National Bank power to receive the stock of the milling company in payment of a pre-existing debt, the bank at the time honestly and reasonably supposing that it could realize the money owing to it more quickly and more certainly by the course than by attempting to enforce the original debt? And this is perhaps but another form of asking: Was the transaction named properly incident to the due prosecution of the banking business? The case of *First Nat. Bank of Charlotte v. National Exch. Bank*, 92 U. S. 122, 23 L. Ed. 679, is instructive. The point decided is thus stated by Mr. Chief Justice Waite: "The question presented for our consideration in this case is whether a national bank organized under the national banking act may, in a fair and bona fide compromise of a contested claim against it, growing out of a legitimate banking transaction, pay a larger sum than would have been exacted in satisfaction of the demand, so as to obtain by the arrangement a transfer of certain stocks in railroad and other corporations, it being honestly believed at the time that by turning the stocks into money under more favorable circumstances than then existed a loss, which would otherwise accrue from the transaction, might be averted or diminished." In the course of the opinion it is said: "Dealing in stocks is not expressly prohibited, but such a prohibition is implied from the failure to grant the power. In the honest exercise of the power to compromise a doubtful debt owing to a bank, it can hardly be doubted that stocks may be accepted in payment and satisfaction, with a view to their subsequent sale or conversion into money, so as to make good or reduce an anticipated loss. Such a transaction would not amount to a dealing in stocks. It was, in effect, so decided in *Fleckner v. Bank*, 8 Wheat. 351, 5 L. Ed. 631, where it was held that a prohibition against trading and dealing was nothing more than a prohibition against engaging in the ordinary business of buying and selling for profit, and did not include purchases resulting from ordinary banking transactions. For this reason, among others, the acceptance of an indorsed note in payment of a debt

due was decided not to be a 'dealing' in notes. Of course, all such transactions must be compromises in good faith, and not mere cloaks or devices to cover unauthorized practices." In *Holmes & Griggs Mfg. Co. v. Holmes & Wessell Metal Co.*, 127 N. Y. 252, 27 N. E. Rep. 831, it is said: "It is doubtless true that a corporation cannot purchase or deal in stocks of another corporation unless expressly authorized by law so to do;" citing cases. "It is equally true, however, that it may do whatever may be necessary in the exercise of its corporate franchise. The selling of property and the collection of debts are among the powers given; and hence it may take title to all kinds of property, even the stock of another company, in payment of a debt." In *People v. Chicago Gas Trust Co.*, 130 Ill. 268, 22 N. E. Rep. 798, the court condemns the purchase by one gas company of the stock of another gas company, and places the ruling upon the specific ground that such purchase was not directly appropriate to the execution of the specific power granted. But the court in terms concedes the right of the purchasing company to receive such stock in payment of a debt. See, further, *Ditch Co. v. Zellerbach*, 37 Cal. 543; *Howe v. Carpet Co.*, 82 Mass. 493; *Ellerman v. Stock-Yards Co.*, 49 N. J. Eq. 217, 23 Atl. Rep. 287; *Thomp. Corp.* § 5719; *Mor. Priv. Corp.* §§ 648, 649, 700, 705. These authorities, we think, clearly establish the principle that any act done by a corporation which is directly incidental to the proper exercise of its franchises cannot be *ultra vires*. The bank had the undoubted power to collect the debt owing to it, and in the exercise of that right it had the incidental power to exchange the debt for property from which it honestly and reasonably supposed it could more certainly realize the money. We have already held that the bank made the exchange for those reasons. The fact, if it be a fact, that the sequel showed such exchange to be disastrous to the bank could not affect the original power to make the exchange.

But we desire to place our ruling also upon another ground. We may concede that the contract of the bank to exchange the debt for the milling stock was *ultra vires*, and yet we cannot reverse this judgment. We notice first that this contract has been fully consummated upon both sides. The stock has been delivered with intent therewith to pay the debt. The stock has been accepted, and the evidences of indebtedness delivered to the debtor, with intent thereby to extinguish the debt. It is an executed contract, and one, as we shall see, wherein the law will leave the parties where it finds them. The authorities upon this subject are in confusion, and, unless carefully analyzed, may be deemed contradictory. The term "*ultra vires*" has been used without accurate discrimination. Certain contracts on the part of corporations may be prohibited by positive law, either statutory or common. Where such contracts are made by corporations, they are, of course, unlawful. They are *mala prohibita*, and void, for the same reason that the prohibited contract of an individual would be void. Yet courts have termed them *ultra vires*, and have then proceeded to say that *ultra vires* contracts were void.

and might be disregarded at pleasure. More properly speaking, *ultra vires* contracts of a corporation are such as do not in any manner serve the accomplishment of the purposes for which the corporation is chartered. They are contracts not positively forbidden, but impliedly forbidden, because not expressly or impliedly authorized. Mr. Zane, in his late and valuable work on Banks and Banking, at page 61 et seq., is inclined to draw the line just here, and say that all so-called *ultra vires* contracts that are made in violation of positive law are void, while all *ultra vires* contracts that are in excess of granted powers are voidable merely, and voidable only prior to completed execution. We are not required to go so far in this case. Perhaps we are not prepared to go quite so far, but where a contract is *ultra vires*, not because the corporation may not make it under any circumstances, but by reason of the particular circumstances under which it is made, then it is never void, and the plea of *ultra vires* cannot be made by either party after the contract has been executed by the other party. The case under consideration well illustrates our meaning. If the contract in question be *ultra vires*, it is not because it is prohibited by positive law, or because it is a contract that the bank could not make under any circumstances. It is conceded that the bank might take the corporate stock as collateral security for a present loan, and in order to collect the loan it might sell the collateral, and become the purchaser and legal owner thereof. It is also conceded that the bank might, in the language of counsel, "take such stock in compromise of a doubtful or contested claim, where to do so would prevent a possible loss. If *ultra vires*, it was because of the circumstances under which it was made, and, as already stated, the plea of *ultra vires* will not avail. We enforced this principle in the recent case of *Clarke v. Olson*, 9 N. D. 364, 83 N. W. Rep. 510. We rested the decision there upon a quotation, with authorities cited, from *Lewis v. Association*, 98 Wis. 203, 73 N. W. Rep. 793, 39 L. R. A. 559. But, as the proposition is vigorously assailed in this case, it may be well to examine the authorities further. We first cite the cases relied upon by appellant, some of which, it may be conceded, fully support his contention. The first is *Central Transp. Co. v. Pullman's Palace-Car Co.* 139 U. S. 24, 11 Sup. Ct. Rep. 478, 35 L. Ed. 55. The holding in that case is in no manner in conflict with our ruling. The court there held the contract void because it was one that the corporation could not make under any circumstances. From the case of *Miller v. Insurance Co.* (Tenn. Sup.) 21 S. W. Rep. 39, 20 L. R. A. 765, which is a Tennessee case, and the authorities therein cited, it would appear that all *ultra vires* contracts are held void in that state. *McCormick v. Bank*, 165 U. S. 538, 17 Sup. Ct. Rep. 433, 41 L. Ed. 817, was a suit on a contract made by the bank at a time when it had no authority to contract. The contract was held void. See, also, *Franklin Co. v. Lewiston Institution for Savings*, 68 Me. 43; *Bailey v. Gaslight Co.*, 27 N. J. Eq. 196; *Thomas v. Railroad Co.*, 101 U. S. 71, 25 L. Ed. 950. But, as fully sustaining

our views as herein before expressed, we call attention to the cases cited in the extended notes to *Central Transp. Co. v. Pullman's Palace-Car Co.*, as reported in 35 L. Ed. 55, and also notes to *Miller v. Insurance Co.*, *supra*, and cite also *Arms Co. v. Barlow*, 63 N. Y. 62; *Parish v. Wheeler*, 22 N. Y. 496; *Navigation Co. v. Weed*, 17 Barb. 378; *Darst v. Gale*, 83 Ill. 136; *Carson City Sav. Bank v. Carson City Elev. Co.*, 90 Mich. 550, 51 N. W. Rep. 641; *Holmes & Griggs Mfg. Co. v. Holmes & Wessell Metal Co.*, 127 N. Y. 260, 27 N. E. Rep. 831; *Raft Co. v. Roach*, 97 N. Y. 378; *State Board of Agriculture v. Citizens' St. Ry. Co.*, 47 Ind. 407; *Oil Creek & A. R. R. Co. v. Penn. Transp. Co.*, 83 Pa. St. 160; *Ditch Co. v. Zellerbach*, 37 Cal. 543; *Bank v. Case*, 99 U. S. 627, 25 L. Ed. 448; *Bank v. Matthews*, 98 U. S. 621, 25 L. Ed. 188; *Kadish v. Ass'n.*, 151 Ill. 531, 38 N. E. Rep. 236; *Anderson v. Bank*, 5 N. D. 451, 67 N. W. Rep. 821; *Sioux Falls Nat. Bank v. First Nat. Bank*, 6 Dak. 113, 50 N. W. Rep. 829; *Tootle v. Bank*, 6 Wash. 181, 33 Pac. Rep. 345; *Voltz v. Bank*, 158 Ill. 532, 42 N. E. Rep. 69; *Bank v. Porter*, 52 Mo. App. 244; *Town of Lexington v. Union Nat. Bank*, 75 Miss. 1, 22 South. Rep. 291; *Cameron v. Bank* (Tex. Civ. App.) 34 S. W. Rep. 178. The judgment of the District Court of Grand Forks county in this case is in all things affirmed. All concur.

(84 N. W. Rep. 8.)

WM. J. ANDERSON vs. J. G. GORDON, *et al.*

Opinion filed November 3, 1900.

Supreme Court—Jurisdiction—Injunction.

This court, in the exercise of its original jurisdiction, can issue a writ of injunction only upon an information therefor filed by the attorney general, or under his authority, and by leave of court first obtained, and in the name of the state.

Application by William J. Anderson for a writ of injunction against J. G. Gordon, county auditor of Nelson county, and John W. Scott, county auditor of Grand Forks county.

Writ denied.

Bosard & Bosard, for relator.

Cochrane & Corliss for defendants.

BARTHOLOMEW, C. J. The plaintiff, William J. Anderson, alleging that he is a citizen of the United States, a resident and qualified elector of the First ward of the city of Grand Forks, First Judicial District of North Dakota, and appearing by his counsel, Messrs. Bosard & Bosard, who disclaim acting under the direction or by the authority of the attorney general, and without any allegation that the attorney general is unable or unwilling to act in the matter, seeks to invoke the original jurisdiction of this court, and procure

an injunction restraining the auditors of the counties of Grand Forks and Nelson, composing the First Judicial District, from placing the name of Charles J. Fisk upon the official ballot to be used at the approaching general election as a candidate for the office of judge of said district. Plaintiff desired to accomplish a restraint, but our statute (section 5343, Rev. Codes) having abolished the writ of injunction as a provisional remedy, and substituted an injunction by order, and as such order could only be made in a pending case, the plaintiff caused a summons and complaint to be served upon the defendants as in an action in the District Court, and also served notice of an application to this court for a restraining order. When the application was made it was suggested by the court that it could exercise original jurisdiction only through jurisdictional writs, and that it could not acquire jurisdiction through service of summons. Thereupon counsel moved for leave to file his complaint as an information for writ of injunction, and that a preliminary injunction issue thereon. The defendants appear specially and object to this proceeding upon the grounds that the state is not a party plaintiff directly or upon relation, and that leave to file the information is not asked by the attorney general or by his authority. We think these objections are well taken. It is true that under the weight of modern authority, voiced by section 5232, Rev. Codes, where the question is one of general interest, one party may, without showing any special interest in himself, sue for all. The state need not be made a party plaintiff in any manner. But that is not the question here. The state constitution (section 87) declares that this court "shall have power to issue writs of habeas corpus, mandamus, quo warranto, certiorari, injunctions and such other original and remedial writs as may be necessary to the proper exercise of its jurisdiction, and shall have power to hear and determine the same." We are not, in this case, concerned about those remedial writs through which this court may exercise its superintending control over inferior courts. Plaintiff asks an original writ. It must be a jurisdictional writ, because it is only through the writ that this court obtains original jurisdiction of the controversy. Injunction is known as the great chancery writ. It was not a prerogative writ, not a writ of right, not a jurisdictional writ, not an original writ, but was a judicial writ used in aid of a jurisdiction that had already attached. In the constitution we find it grouped with the great common-law prerogative writs that might always be used as original writs. It seems to be the mandate of the constitution that this court should use the writ of injunction, in cases where that is the appropriate writ, in the same manner and by the same means employed in the use of the prerogative writs with which it is grouped. Either that must be done, or a court of limited original jurisdiction must acknowledge its inability to employ the writ of injunction as an original writ. But courts cannot disregard or emasculate the plain provisions of a fundamental law. It has, therefore, been held, under

identical language, that courts must treat the writ of injunction as a *quasi* prerogative writ. That such is the proper course is conclusively shown in the masterful opinion of Chief Justice Ryan in *Attorney General v. Chicago & N. W. Ry. Co.*, 35 Wis. 425. See page 512 et seq. But, treating it as a prerogative writ, it must be procured as prerogative writs always have been secured; and that is upon an information filed by the law officer of the state, or with his authority, upon leave granted, and in the name of the state. This is the practice prescribed by this court in *State v. Nelson Co.*, 1 N. D. 88, 45 N. W. Rep. 33, 8 L. R. A. 283. Since the decision of that case this court has upon several occasions been called upon to exercise its original jurisdiction in mandamus cases. This is the first instance since the *Nelson County Case* where an injunction has been asked. It is for this reason that we have stopped to point out why our original jurisdiction could be exercised in the issuance of that writ only in the same manner in which it is exercised in procuring the issuance of prerogative writs proper. The application for leave to file the information not being made by the attorney general, or in the name of the state, the writ must be denied. All concur.
(83 N. W. Rep. 993.)

MCCORMICK HARVESTING MACHINE CO. *vs.* WILLIAM RAE, *et al.*

Opinion filed November 26, 1900.

Extension of Time to Debtor—Release of Surety.

A creditor, by extending time of payment to his debtor without the knowledge or consent of a surety, thereby releases such surety. It is necessary, however, to the validity of such extension, that it be upon a sufficient consideration, and to a definite time.

Negotiable Instruments—Answer—Insufficient Averments to Show Discharge of Surety.

The answer of a surety to a complaint on promissory notes which merely alleges that the notes were extended without his knowledge or consent, and does not allege the time to which they were extended, or that the payee agreed to extend time of payment for any definite period, does not allege a valid extension, and states no defense. It is accordingly *held* that it was error to overrule a demurrer to such answer based upon the ground that it did not state facts sufficient to constitute a defense.

Appeal from District Court, Cass County; *Pollock, J.*

Action by the McCormick Harvesting Machine Company against William Rae and others. From a judgment overruling a demurrer to the answer of William Rae, plaintiff appeals.

Reversed.

Benton, Lovell & Holt, for appellant.

A co-maker of a promissory note, though a surety, is not entitled to notice of dishonor. *Edwards, Bills & Notes*, 454; 1 *Parson's*

Notes & Bills, 236; *Hartman v. Burlingham*, 9 Cal. 557; *Fitch v. Bank*, 97 Ind. 211; *Bond v. Storrs*, 13 Conn. 412; *Hunnicut v. Perot*, 27 S. E. Rep. 787; *Butner v. Liebig*, 38 Mo. 188; *Treadway v. Antisdal*, 86 Mich. 82; *Carpenter v. McLaughlin*, 12 R. I. 270; *Scott v. Shirks*, 60 Ind. 160. Respondent's answer alleges that he, as surety, is discharged by an extension of the obligation granted by the creditor to his principals. The allegation of extension is a legal conclusion. There would be no legal extension of the time of payment of the notes in suit without a valid agreement therefor, and there is no averment that the extension was for a definite period of time. 2 Randolph on Commercial Paper, 642; *Olson v. Chism*, 51 N. E. Rep. 373; *Smith v. Freyler*, 1 Pac. Rep. 214, 4 Mont. 498; *Glickhauf v. Hirschorn*, 73 Ill. 574; *Prather v. Young*, 67 Ind. 480; *Voris v. Schott*, 50 N. E. Rep. 484; *Winnie v. Colorado*, 3 Col. 158; *Bank of Commerce v. Humphrey*, 6 S. D. 415, 61 N. W. Rep. 444, 12 Enc. Pl. & Pr. 1024-1026, n. 2.

Cole & Johnson, for respondent.

Defendant's answer sufficiently pleads the extension of time of payment, the consideration therefor, and the fact that respondent had no knowledge of such extension. Bigelow on Bills & Notes, p. 584; *Dohn v. Bronger*, 47 S. W. Rep. 619; 2 Daniels, Neg. Instr. 1312; *St. Paul Trust Co. v. St. Paul Chamber of Commerce*, 73 N. W. Rep. 408; *Moulton v. Posten*, 8 N. W. Rep. 607; *Lambert v. Shitter*, 17 N. W. Rep. 187; *Stevens v. Oaks*, 25 N. W. Rep. 309; *State National Bank v. Stratton*, 50 S. W. Rep. 631; *Lambert v. Shetler*, 32 N. W. Rep. 424; *Wendling v. Taylor*, 10 N. W. Rep. 675; *Bangs v. Strong*, 16 N. Y. Com. Law, 578; *Huffman v. Hulbert*, 12 N. Y. Com. Law, 412; §§ 3866-3871-3872, Rev. Codes. An extension that would cover a reasonable time is a definite extension and releases the surety, although no definite time to which the extension was made is mentioned. § 3915, Rev. Codes; *Acme Harvester Co. v. Axtell*, 5 N. D. 315, 65 N. W. Rep. 680; *Liljengren Furniture Co. v. Mead*, 44 N. W. Rep. 306; *Greenwood v. Davis*, 64 N. W. Rep. 26.

YOUNG, J. Action on three promissory notes executed and delivered by the defendants J. T. Rae, Robert Rae, and William Rae to plaintiff. The two defendants first named did not answer. The defense attempted to be interposed by William Rae is that he is merely a surety on said notes, and that he has been released by an extension of time granted by the payee to the principals without his knowledge or consent. Plaintiff demurred to the answer on the ground that it does not state facts sufficient to constitute a defense. This was overruled, and plaintiff appeals from the order.

The law is settled beyond dispute that, where a creditor and the principal debtor make a valid contract extending the time of payment without the knowledge and consent of a surety, the surety is discharged from his liability. It is equally well settled that a contract of extension, to be valid and operative, must be between the

creditor and principal debtor. It must rest upon a sufficient consideration, and the extension agreed upon must be for a definite time; in other words, it must be such an agreement as precludes the creditor from enforcing payment against the principal until the expiration of a specified period. *Draper v. Romeyn*, 18 Barb. 166; *Wheeler v. Washburn*, 24 Vt. 293; *Pierce v. Goldsberry*, 31 Ind. 52; *Board v. Covington*, 26 Miss. 471. "To discharge a surety by extension of time, there must be a sufficient consideration, and a time definitely fixed." *Gardner v. Watson*, 13 Ill. 347; *Flynn v. Mudd*, 27 Ill. 326; *Galbraith v. Fullerton*, 53 Ill. 126; *Glickauf v. Hirschhorn*, 73 Ill. 574; *Winne v. Springs Co.*, 3 Colo. 155; *Starret v. Burkhalter*, 70 Ind. 285; *Arms v. Beitman*, 73 Ind. 85; *Henry v. Gilliland*, 103 Ind. 177, 2 N. E. Rep. 360; *Beach v. Zimmerman*, 106 Ind. 495, 7 N. E. Rep. 237. And a surety is released only when the extension is for a definite period. *Voris v. Shotts* (Ind. App.) 50 N. E. Rep. 484. Where the consent to forbear is for a loose and uncertain period, the creditor's hands are not tied, and the surety is not released. *Jarvis v. Hyatt*, 43 Ind. 163; *Miller v. Stem*, 2 Pa. St. 286; *Rand. Com. Paper* (2d Ed.) § § 954, 958, 1820. See, also, *Bank v. Torrey* (S. D.) 73 N. W. Rep. 193. The question presented by the demurrer in the case at bar is whether the answer interposed alleges a valid contract of extension. If it does, it states a defense; if not, the demurrer should have been sustained. The allegations relative to the contract of extension are as follows: "That said notes were extended for payment by plaintiff to the defendants Robert Rae and J. T. Rae in the year 1897 in consideration of the fact that said two defendants did then buy from said plaintiff two new harvesting machines, and that said extension was given without the knowledge, consent, acquiescence, or approval of this defendant." Does this answer allege such a contract of extension as would discharge a surety? It is entirely clear that it does not. We may assume, without deciding the question, that a consideration for the extension is alleged in the answer, and further assume that the allegation "that said notes were extended" is an allegation of an issuable fact, and not a mere conclusion of law. Yet it wholly fails to allege a material fact, which, under the authorities, is vital to a valid contract of extension, namely, that plaintiff agreed to extend the time of payment to some fixed and definite period. As has been seen, this element of a contract of extension is as vital as the consideration. The cases are numerous where answers of sureties pleading a release because of extension of time have been held bad upon demurrer for failure to allege a sufficient consideration for the alleged contract of extension. *Galbraith v. Fullerton*, supra; *Flynn v. Mudd*, supra. For the same reason an answer which does not allege the time to which payment was extended states no defense, and will be held bad on demurrer. Such have been the holdings of the courts whenever the question has been presented. *Glickauf v. Hirschhorn* 73 Ill. 574. In *Meniffee v. Clark*, 35 Ind. 304, an answer was held insufficient on demurrer solely because it did "not allege any definite time

for which the extension was given," although it was held sufficient as to allegation of consideration. This case was followed and approved in *Abel v. Alexander*, 45 Ind. 523; *Bucklen v. Huff*, 53 Ind. 474. See, also, *Olson v. Chism* (Ind. App.) 51 N. E. Rep. 373, and cases cited in opinion. Counsel for respondent urge, however, that under the new procedure, requiring the allegations of pleadings to be liberally construed, which rule has been adopted in this state, and is found in section 5283, Rev. Codes, the answer is sufficient. It is clear that no rule of construction, however liberal, can supply and arbitrarily inject into a pleading an averment of a material fact which has been wholly omitted. Furthermore, the rule applies to allegations which are made, and are ambiguous and defective, and has no reference to the omission of material averments. Phillips, in his work on Code Pleading (section 352), says: "In the application of this canon of construction it must be borne in mind that it relates to matters of form, and in no way dispenses with the fundamental requisites of a pleading," which are that all traversable facts shall be stated issuably. Under the authorities it is essential to the validity of a contract of extension that the agreement to extend shall be to a definite time. The answer contains no such averment, and accordingly does not state a defense. The District Court is directed to vacate its order, and enter an order sustaining the demurrer. All incur.

(84 N. W. Rep. 346.)

GULL RIVER LUMBER COMPANY vs. R. H. BRIGGS.

Opinion filed November 16, 1900.

Mechanic's Lien—Foreclosure.

To entitle a party to foreclose a mechanic's lien upon a building only, and sell the same separate and apart from the land upon which it stands, it is necessary, under the present mechanic's lien law of this state (sections 4788-4801, inclusive, Rev. Codes), that the complaint should show either that the building was erected by one who had a leasehold interest in the land whereon the building is situated, and that the lease has become forfeited, or that there were existing liens upon the land at the time the materials were furnished or labor done for which the lien is claimed.

Appeal from District Court, Barnes County; *Glaspell, J.*

Action by the Gull River Lumber Company against R. H. Briggs. Judgment sustaining a demurrer to the complaint, and plaintiff appeals.

Affirmed.

Young & Combs, for appellant.

Complainant is not required to allege and prove the precise title of the party with whom he made the contract to the land, for the lien is enforced only upon such interest as he has in the premises. *Miller v. Bergenthal*, 20 Wis. 474, 7 N. W. Rep. 356; *Moritz v.*

Splitt, 55 Wis. 441, 13 N. W. Rep. 555; *Jones on Liens*, § 1592. The averments of a petition for a mechanic's lien, in regard to the interests of the defendant, are sufficient to sustain a decree against him if enough appears to disclose the rights of the parties and to admit all evidence bearing upon these rights. *Henderson v. Connolly*, 14 N. E. Rep. 1; *Rice v. Hall*, 41 Wis. 453; *Shaw v. Allen*, 24 Wis. 563; *Chisholm v. Williams*, 128 Ill. 115; *Jones on Liens*, §§ 1591-1592. A mechanic's lien, for materials furnished, may attach not only to the lien-hold estate, but to estates and interests of the most minute and transient character. *Hathaway v. Davis*, 5 Pac. Rep. 29; *Phillips, Mech. Liens*, § 19; *Turney v. Saunders*, 4 Scam. 527; *Donaldson v. Holmes*, 23 Ill. 85. The party in possession or occupancy of land upon which a structure, for his use and benefit, is erected is presumed to have such an interest therein as is chargeable with a mechanic's lien, and such presumption continues until the contrary is made to appear. *Philips, Mech. Liens*, § 187; *McCulloch v. Caldwell*, 5 Ark. 237; *Dean v. Pyncheon*, 3 Chand. (Wis.) 9. In an action to foreclose a lien for materials furnished the petition contained no allegation in the body thereof that the contract to furnish materials was with the owner, but the petition referred to the lien statement attached, which lien statement clearly disclosed the contract to furnish materials was with the owner. Held, that the petition sufficiently disclosed that the contract was with the owner. *Jarvis, Etc. Co. v. Sutton*, 26 Pac. Rep. 406. Notwithstanding the averment in the complaint that the state of North Dakota owned the land in fee, nevertheless the person with whom the contract for the purchase of material was made was, under the averment, the owner of the building constructed with said material; was also the purchaser and occupant of the land upon which it was situated. The interest of Haynes in the land was such as would be subject to the attachment of the lien. Haynes being in possession is presumed to be there rightfully. *Mason v. Park*, 3 Scam. 532; *Davis v. Easley*, 13 Ill. 192. The land may be subjected to sale, and whatever interest Haynes may have therein, be it more or less, will vest in the purchaser. *Sweitzer v. Scyles*, 3 Gil. 529; *Talbot v. Chamberlain*, 3 Paige 220; *Dean v. Pyncheon*, 3 Chand. 9; *Jackson v. Garnsey*, 16 Johns. 192; *Jackson v. Parker*, 9 Cow. 73; *Jackson v. Graham*, 3 Caines Cas. 189; *Chambers v. Benoist*, 25 Mo. App. 520; *Jackson v. Towne*, 4 Cow. 602; *Steigleman v. McBride*, 17 Ill. 299; *McCulloch v. Caldwell*, 5 Ark. 237. The complaint contains traversable allegations of all the essentials to entitle plaintiff to maintain and enforce its lien and it was not pregnable to demur. *Howe v. Smith*, 6 N. D. 432; *Rush Owen Lumber Co. v. Fitch*, 5 S. D. 213; *Red River Lumber Co. v. Congregation*, 7 N. D. 46; *McCrea v. Craig*, 23 Cal. 522; *McCoy v. Quick*, 30 Wis. 521; *Miller v. Bergenthal*, 50 Wis. 474; *McFadden v. Stark*, 58 Ark. 7; *Caddington v. Beebe*, 29 N. J. L. 550. The intention of the statute, §§ 4788-4794, Rev. Codes, is to give a lien upon both the land and the building, or either of them. The

statute is remedial and the claim for lien being sufficient in substance it will be sustained. *McCumber v. Bigelow*, 126 Cal. 9; *McGinty v. Morgan*, 122 Cal. 103; *Mahon v. Surerus*, 9 N. D. 57, 81 N. W. Rep. 64. If the statute gives a lien to the material man upon both the land and the building, or either of them, then it is unnecessary to show that the person with whom the contract for the purchase of the materials was made had no legal interest in the land itself. A right to a lien upon the improvements may exist without any contract with the owner of the fee, but by contract with the owner of the improvements. *Lane v. Snow*, 66 Ia. 544, 24 N. W. Rep. 35; *Jones on Liens*, § 1250.

Lockerby & White, for respondent.

The notice for a mechanic's lien filed by appellant is void on its face. It recites that the contract has not been completed. *Philips on Mech. Liens*, 223; *Roylance v. St. Louis Hotel Co.*, 15 Pac. Rep. 777; 20 Pac. Rep. 576; *Seaton v. Chamberlain*, 4 Pac. Rep. 89; *Schwartz v. Knight*, 16 Pac. Rep. 235; *Catlin v. Douglas*, 33 Fed. Rep. 569; *Davis v. Bullard*, 32 Kan. 234, 4 Pac. Rep. 75; *Seaton v. Chamberlain*, 32 Kan. 239, 4 Pac. Rep. 89; *Crawford v. Blackman*, 30 Kan. 527, 1 Pac. Rep. 136; 2 *Jones on Liens*, § 1430. The complaint is fatally defective in not alleging that Haynes had some estate or interest in the land upon which the building was erected. *Peck v. Bridewell*, 6 Mo. App. 451; *Clarke v. Raymon*, 27 Mich. 456; *Shaw v. Allen*, 24 Wis. 563; *Monroe v. West*, 12 Ia. 119; *Thaxter v. Williams*, 14 Pick. 49. The building becomes a part of the real estate as soon as it is attached to the land, and the building is all the debtor in such case could claim to own. The building could never be sold as the debtor's personal property, or levied upon as his real estate. 2 *Jones on Liens*, § 1247; *Rabbit v. Condon*, 27 N. J. L. 159; *Wager v. Briscoe*, 38 Mich. 587; *Haynes v. Fessenden*, 106 Mass. 228. The complaint, independent of the notice, must state a cause of action. *Shaw v. Allen*, 24 Wis. 563; *Altman v. Siglinger*, 2 S. D. 446.

BARTHOLOMEW, C. J. Action to foreclose a mechanic's lien. A demurrer to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action was sustained, and plaintiff appeals. The lien is sought to be imposed upon the building only, and for materials that entered into its construction. The defendant is the vendee of the party by whom the building was erected. No personal judgment is claimed, or, under the complaint, could be recovered, in this case, against any one. Unless the complaint entitles plaintiff to the foreclosure of the lien claimed, it cannot be sustained for any purpose. To entitle a party to a lien for materials furnished to be used in the construction of a building, such materials must be furnished pursuant to a contract with the owner of the land upon which the building is situate. Such is the clear requirement of section 4788, Rev. Codes. The complaint in this case alleges that at the time such materials were furnished the

state of North Dakota was, and ever since has been, the owner in fee of the land upon which the building is situated. No contract with the state is claimed, but it is alleged that the contract was made with one Haynes, defendant's vendor of the building. It is claimed that the complaint sufficiently shows that the building was erected for the immediate use and benefit of said Haynes, and that by reason of that fact, and for the purpose of the mechanic's lien law, he was the "owner" of the land, under section 4798, Rev. Codes. This section is identical with section 5483, Comp. Laws. In the case of *Mahon v. Surerus*, 9 N. D. 17, 81 N. W. Rep. 64, this court construed the latter section, and held that a contract made with one who had a homestead filing upon land would support a lien upon the building for materials used by such party in the construction of a house upon said land for his own use, notwithstanding the fact that under section 2296, Rev. St. U. S., the land could not be subjected to or sold under any such lien. This holding was based upon the fact that under section 5480, Comp. Laws, the plaintiff might, in every case, enforce his lien against the building without selling any interest whatever in the land upon which it stood. That feature of the statute as it appeared in the Compiled Laws has been materially changed by the statute as it appears in the Revised Codes. It is true that the language giving the lien as found in section 4788, Rev. Codes, is the same as the former law, and declares that the party shall have "a lien upon such building, erection or improvement and upon the land belonging to such owner on which the same is situated." In *Mahon v. Surerus* we held that this language imported two separate liens, one upon the building and one upon the land. We so held because, as stated, under section 5480, Comp. Laws, the plaintiff could always enforce his lien upon the building alone, and remove it from the land. This cannot now be done. The buildings can now be sold and removed only under the conditions prescribed in sections 4794 and 4795, Rev. Codes. The first of these sections declares that the entire land upon which the building is situated "shall be subject to all liens created by this chapter to the extent of all right, title and interest owned therein by the owner thereof for whose immediate use or benefit such labor was done or things furnished, and when the interest owned in such land by such owner of such building, erection or other improvement is only a leasehold interest, the forfeiture of such lease for the nonpayment of rent or for noncompliance with any of the other stipulations therein shall not forfeit or impair such lien so far as it concerns such buildings, erections or improvements, but the same may be sold to satisfy such lien and be removed within thirty days after the sale thereof by the purchaser." From this section it appears that, where materials are sold to one having a leasehold interest in land for the purpose of erecting a building upon such land, the lien for such materials must be enforced against the leasehold estate, including the building, which, as to the lienholder, becomes a part of the leasehold estate. But the lien cannot be defeated by a forfeiture of

the leasehold interest, thus cutting off all estate in the land to which the lien could attach. In that event, and only in that event, the lien may be enforced against the building alone, and it may be removed from the land. Section 4795 provides that the liens for the things stated shall attach to the buildings or improvements in preference to any prior lien on the land, and, in order to give effect to this provision, it is declared that a court may, where there are prior incumbrances upon the land, direct that the building alone be sold to satisfy the mechanic's lien, and removed from the premises. It is only under these conditions that the buildings can be removed, and it is clear that in each the party erecting the building must have an interest or estate in the land that might be the subject of a judicial sale and transfer but for the conditions named in the statute. In all other cases the building must remain upon the land; but a lien upon a building that could in no manner be utilized would be so barren of benefits that we cannot presume the legislature ever intended to confer it. As the law now stands in this state, no mechanic's lien can attach to the building or the land unless the party for whose immediate use and benefit the building is erected has some estate or interest in the land. Our present statute would, perhaps, be more symmetrical if section 5483, Com. Laws,—being section 4798, Rev. Codes,—had been changed to conform to other changes made. We cannot conceive that it was ever intended to permit a trespasser upon land, by erecting a building thereon for his own "immediate use and benefit," to charge the land with a lien for the value of the work and materials in the building. The complaint in this case contains no allegations showing that the party who purchased the materials and erected the building had any leasehold interest in the land upon which the building was placed, or that any such lease, if it existed, had been forfeited for any reason. Nor is there any allegation that there were any existing liens upon the land when the materials were furnished for the building that was erected thereon. Hence plaintiff is not entitled to any separate sale of the building. That is, however, the specific relief that he asks, and certainly his complaint entitles him to no other. The demurrer was properly sustained. Affirmed. All concur.

(84 N. W. Rep. 349.)

FRED HENNIGS, *et al* vs. JOHN PASCHKE, *et al*.

Opinion filed November 20, 1900.

Deed—Designation of Grantee.

A deed of real estate, to be effective as a conveyance of title, must designate a grantee, otherwise no title passes; but it is sufficient if the deed, when construed as a whole, distinguishes the grantee from the rest of the world.

Sufficient Description of Grantee in a Deed.

A certain deed of real estate examined, and held that it sufficiently describes the grantee, and is valid as a conveyance.

Failure to Record Assignment of Mortgage—Rights of Subsequent Purchaser.

Upon the equitable principle that, where one of two or more innocent persons must suffer for the wrongful act of a third, he must suffer who left it in the power of such third person to do the wrong, it is *Held* that plaintiffs, who are purchasers of certain promissory notes secured by a real estate mortgage, by neglecting to take and place of record an assignment of the same, forfeited their rights under said mortgage as against the defendant, who purchased the mortgaged premises in good faith, and in reliance upon the record title.

Rights of Bona Fide Purchaser—Conveyances.

Assignments of real estate mortgages are conveyances within the meaning of section 3594, Rev. Codes, and under said section, for the purpose of notice, must be recorded, and, if not so recorded, are void as to subsequent purchasers of the mortgaged premises who purchase in good faith and for a valuable consideration, and first record the conveyances.

Appeal from District Court, Walsh County; *Sauter, J.*

Action by Fred Henniges and others against John Johnson and others. Judgment for defendant John Paschke, and plaintiffs appeal. Affirmed.

J. E. Gray, for appellant.

The general rule of law is that a deed must designate the grantee, otherwise it is a nullity and passes no title. *Allen v. Allen*, 51 N. W. Rep. 473; *Allen v. Withrow*, 110 U. S. 119, 28 L. Ed. 90; *Paul v. Moody*, 7 Greenl. 455; *Whitaker v. Miller*, 83 Ill. 311; *Chase v. Palmer*, 29 Ill. 306, 9 Am. & Eng. Enc. L. (2d Ed.) 132, and note; *Hardin v. Hardin*, 11 S. E. Rep. 102. The grantee under a quitclaim deed is not a bona fide purchaser. *Finch v. Trent*, 24 S. W. Rep. 679; *American Mortgage Co. v. Hutchinson*, 24 Pac. Rep. 515. The plaintiff, Henniges, and Bradley are each bona fide holders, for value, before maturity, of the promissory notes, and are entitled to a decree of foreclosure for the amount represented by their notes as against the defendants. *Hollinshead v. Stuart & Co.*, 77 N. W. Rep. 89; *Stolzman v. Wyman*, 77 N. W. Rep. 285; *Purdy v. Huntington*, 42 N. Y. 344. Paschke is not such a bona fide purchaser as will be protected against the lien of plaintiff's mortgage. *Mathew v. Jones*, 66 N. W. Rep. 622; *Peterborough Savings Bank v. Pierce*, 75 N. W. Rep. 20; *Babcock v. Young*, 75 N. W. Rep. 302; *Wilson v. Campbell*, 68 N. W. Rep. 278; *Williams v. Keyes*, 51 N. W. Rep. 520; *Dutton v. Ives*, 5 Mich. 515; *Joy v. Vance*, 62 N. W. Rep. 140; *Bromley v. Lathrop*, 63 N. W. Rep. 510; *Trowbridge v. Ross*, 63 N. W. Rep. 534; *Windle v. Bonebrake*, 23 Fed. Rep. 165. The assignments of mortgage, by Walker to Cashel, and by Cashel to Walker, and the satisfaction by F. T. Walker are nullities. Rev. Codes, §§ 4694 and 3529; *Polhemus v. Trainer*, 30 Cal. 685; *Loan Ass'n. v. Dowling*, 74 N. W. Rep. 438; *Peter v. Jamestown*, 5 Cal. 335. Paschke was not a good faith

purchaser because he had notice of facts which would put a prudent man upon inquiry. *Gress v. Evans*, 1 Dak. 371.

Cochrane & Corliss, for respondent.

The fact that John Paschke paid for the land after the notice of *lis pendens* had been filed does not render him chargeable with constructive notice of the pendency of the action, because the statute declares that every person whose conveyance or incumbrance is subsequently executed or subsequently recorded shall be deemed a subsequent purchaser or incumbrancer, and shall be bound by proceedings taken after the filing of the notice. § 5251, Rev. Codes. The filing of *lis pendens* did not give Paschke notice that there was an action pending or that the plaintiffs were the owners of the mortgage in question. The records where the ownership should have been disclosed did not disclose the mortgage. 2 Jones, Real Property, § 1559. The doctrine of *lis pendens* is not carried to the extent of making it constructive notice of a prior unregistered deed; as, for instance, proceedings to foreclose an unrecorded mortgage do not constitute such a *lis pendens* as would be notice to a purchaser of mortgaged property. *Barker v. Bartlett*, 45 Pac. Rep. 1084; 1 Jones, Mortg., § 583; *Newman v. Chapman*, 14 Am. Dec. 766; Story's Eq. Jur. § 406; *Wyatt v. Barwell*, 19 Ves. 435; 1 Pindgree, Mortg. § 744; *Douglas v. McCrackin*, 52 Ga. 596. The doctrine of *lis pendens* does not rest upon the idea of notice. *Jennings v. Kierman*, 55 Pac. Rep. 443; *Hennington v. Hennington*, 27 Mo. 560; *Lamont v. Chessier*, 65 N. Y. 30, 13 Am. & Eng. Enc. L. 870, 871; 2 Devlin, Deeds, § 79. In an action to foreclose a mortgage the statute relating to the filing of a *lis pendens* is not applicable. § 5251 Rev. Codes; *Brown v. Cohn*, 69 N. W. Rep. 71. *Lis pendens* statutes do not create the law of *lis pendens* in the particular jurisdiction in which they are operative, but may rather be regarded as imposing limitations upon the common law otherwise existing upon the subject. The common law rule of *lis pendens* must not be regarded as in effect in each state except in so far as it has been modified by the statutes. 56 Am. St. Rep. 855, 856, note. The common law rule of *lis pendens* controlled this action of foreclosure, and while it is true that the defendant did not pay for the property until after the complaint and *lis pendens* had been filed, yet he fully paid for it before the summons in the action was served on any of the defendants. It therefore follows that the action was not pending for the purpose of constituting notice to defendant at the time he purchased; for, at common law, to constitute a *lis pendens*, the summons or subpoena must be served on some of the defendants. 13 Am. & Eng. Enc. L. 883; *Leitch v. Wells*, 48 N. Y. 585, 610; *Duff v. McDough*, 25 Atl. Rep. 608; *Bank v. Taylor*, 23 N. E. Rep. 347; *Grant v. Bennett*, 96 Ill. 513, 522; *Hennington v. Hennington*, 27 Mo. 560; *Staples v. Handley*, 12 S. W. Rep. 339; 2 Pomeroy, Eq. Jur. § 634; *Majors v. Caldwell*, 51 Cal. 478, 484; *Freeman*, Judg. § 195; *Miller v. Kershaw*, 23 Am. Dec. 183, 14 Am. Dec. 776 and

note; *Tigge v. Rowland*, 84 Ill. App. 238; 1 Jones, Mortg. § 584; Wade, Notice, § 348. One who has a contract for the purchase of property pays the consideration and takes the conveyance after the action affecting it has been instituted, is not a purchaser *pendente lite*. *Parks v. Smoots Admin.*, 48 S. W. Rep. 146; *Norton v. Birge*, 35 Conn. 250; *Jennings v. Kierman*, 55 Pac. 443; *Grant v. Bennett*, 96 Ill. 515; *Kursheedt v. W. D. S. Inst.*, 118 N. Y. 363; *Lamont v. Chessier*, 65 N. Y. 30. Paschke bought and parted with his money relying upon the record and abstract showing that the mortgage in question was owned by F. T. Walker and upon a satisfaction thereof, which was in fact executed by F. T. Walker and was in the possession of John P. Walker at the time the transaction was consummated, being delivered to Paschke on the payment of the purchase money. Plaintiffs, by failing to obtain and record an assignment of the mortgage, placed it in the power of Walker to deceive defendant and cause him to believe that Walker had authority to satisfy the mortgage. Therefore, the law treats the transfer to plaintiffs as void as against the conveyance to Paschke. *Girardin v. Lampe*, 16 N. W. Rep. 614; *Merrill v. Luce*, 61 N. W. Rep. 43; *Livermore v. Maxwell*, 55 N. W. Rep. 37; *Merrill v. Hurley*, 62 N. W. Rep. 958; *Pickford v. Peebles*, 63 N. W. Rep. 779; *Quincy v. Ginesbach*, 60 N. W. Rep. 511; *Whipple v. Fowler*, 60 N. W. Rep. 15; *Pritchard v. Kalamazoo*, 47 N. W. Rep. 31; *Williams v. Jackson*, 2 Sup. Ct. Rep. 814; *Morris v. Beecher*, 45 N. W. Rep. 696; *Ogle v. Turpin*, 102 Ill. 148; *Ladd v. Campbell*, 56 Vt. 529; *Torrey v. Deavitt*, 53 Vt. 331; *Donaldson v. Grant*, 49 Pac. Rep. 779; *Van v. Marbury*, 14 South. Rep. 273; *Frank v. Snow*, 42 Pac. Rep. 484; *Moran v. Wheeler*, 27 S. W. Rep. 54; *Bank v. Anderson*, 14 Ia. 544; *Fallas v. Pierce*, 30 Wis. 443; *Van Kueren v. Corkins*, 66 N. Y. 77; *Bacon v. Van Schoonover*, 87 N. Y. 446; *Park v. Mackin*, 95 N. Y. 347; *Schwartz v. Leist*, 13 Ohio St. 419; *Parmeter v. Oakley*, 28 N. W. Rep. 653; *Cornog v. Fuller*, 30 Ia. 212; *Life Ins. Co. v. Talbot*, 14 N. E. Rep. 586; 1 Jones, Mortg. § 479; 1 Pingree, Mortg. §§ 656, 657; *Bank v. Buck*, 44 Atl. Rep. 93; *Henderson v. Pilgrom*, 22 Tex. 664; *Swasey v. Emerson*, 46 N. E. Rep. 426; *Ferguson v. Glasford*, 35 N. W. Rep. 820; *Dawes v. Craig*, 17 N. W. Rep. 778; *Bowling v. Cook*, 39 Ia. 200; *Fletcher v. Kelley*, 55 N. W. Rep. 474; *Trust Co. v. Mfg. Co.*, 68 N. W. Rep. 587; *Lewis v. Kirk*, 28 Kan. 497; *James v. Curtis*, 78 N. W. Rep. 261. John P. Walker had authority to insert his own name as grantee and any consideration he might see fit to insert in the deed, in view of the fact that it is expressly found and was stipulated on the trial that F. T. Walker authorized John P. Walker to make such insertions. *Logan v. Miller*, 76 N. W. Rep. 1905; *McCleary v. Wakefield*, 2 L. R. A. 529, 41 N. W. Rep. 210; *State v. Mathews*, 10 L. R. A. 308, 25 Pac. Rep. 36; *Vought's Executors v. Vought*, 27 Atl. Rep. 489; *Jennings v. Jennings*, 34 Pac. Rep. 31; *Cribben v. Deal*, 27 Pac. Rep. 1046; *Spitler v. James*, 32 Ind. 202; *Stewart v. Ballou*, 47 Ia. 188; *Inhabitants v. Huntress*, 53 Me. 89; *Phelps v.*

Sullivan, 104 Mass. 36; *State v. Young*, 23 Minn. 551; *Field v. Stagg*, 52 Mo. 534; *Ex parte Kerwin*, 8 Cow. 148; *Stahl v. Berger*, 10 Sarg. & R. 170; *Wiley v. Moor*, 17 Sarg. & R. 438. In the absence of express authorization authority to fill in such blanks may be inferred from circumstances. *Van Etta v. Evenson*, 28 Wis. 33; *Davis v. Lee*, 59 Am. Dec. 267; *Inhabitants v. Huntress*, 53 Me. 89; *State v. Young*, 23 Minn. 551; *Swartz v. Ballou*, 47 Ia. 118; *Anguello v. Bowes*, 67 Cal. 447. As against a bona fide purchaser a grantor is estopped from denying that the instrument is his deed when he has signed the same in blank and intrusted the possession thereof to a third person. 2 Am. & Eng. Enc. L. (2d Ed.) 258, 259. The conclusive presumption is, in the absence of any evidence to the contrary, that the parties intended to convey the land to the one who appeared on the face of the instrument to have paid the consideration for the deed. *Mardes v. Meyros*, 28 S. W. Rep. 693; *Vineyard v. O'Connor*, 36 S. W. Rep. 424; *Newton v. McKay*, 29 Mich. 1; *Bay v. Posner*, 26 Atl. Rep. 1084. There was evidence on the trial tending to show that a consideration of one dollar was inserted in the deed, and subsequently John P. Walker wrote after the word "one" the word "thousand," changing the consideration from one to one thousand dollars. The grantor authorized an insertion of any consideration in the deed which John P. Walker might see fit to insert. The case is not one of alteration, but the exercise by the party to whom the deed was delivered of a lawful authority. Even if treated as an alteration it was not material because as altered the instrument does not speak a language different in legal effect from that which it originally spoke. 2 Am. & Eng. Enc. L. (2d Ed.) 185, 222. The recital of a consideration is an immaterial part of the deed. 6 Am. & Eng. Enc. L. (2d Ed.) 767. An change of the consideration does not effect the legality of the instrument. *Cheek v. Nall*, 17 S. E. Rep. 80; *Murray v. Klinzing*, 29 Atl. Rep. 244; *Gardner v. Harback*, 21 Ill. 129; *Murray v. Klinzing*, 64 Conn. 78. Inasmuch as the title to the land passed the moment the deed was delivered the subsequent alteration of the deed could not effect the instrument as a conveyance, for the reason that it has already operated as a conveyance, and the law does not divest a party of his title merely because he has changed or destroyed the instrument which gave him title. 2 Am. & Eng. Enc. L. (2d Ed.) 197, 198; *Chessman v. Whitmore*, 23 Pick. 231.

YOUNG, J. This is an action to foreclose a real estate mortgage. The mortgage in question was given by John Johnson, one of the defendants herein, to one John P. Walker, to secure his eight promissory notes of even date therewith. It was placed on record on June 28, 1895, the day it was executed. Four of the notes were for \$500 each, and matured, respectively, on November 1, 1895, 1896, 1897, and 1898. The remaining four notes were for \$1,000 each and matured, respectively, on November 1, 1899, 1900, 1901, and 1902. All of the notes were transferred to plaintiffs before matur-

ity, and are unpaid. No written assignment of the mortgage was executed by the mortgagee to plaintiffs. Their rights in the mortgage arise from their ownership of the debt secured thereby. They seek also to have the title of the defendant Paschke, who claims to be a good-faith purchaser of the mortgaged premises, declared subject to the lien of the mortgage. The defendants Johnson and Walker did not answer. The answer of Paschke presents the only issues in the case. His answer, in effect, is that he is a good-faith purchaser of the mortgaged premises under the recording laws of this state, and that his title is, therefore, freed from the lien of the mortgage in suit. His claim is that when he purchased the land there was nothing of record to apprise him of the fact that plaintiffs had any interest in the mortgage, and that he purchased and paid for the mortgaged premises in reliance upon the record title, and received from his vendor a proper satisfaction of the mortgage in suit, executed by the record owner thereof. The trial court sustained his defense, and entered judgment declaring the mortgage void as to him, and confirming his title to the premises. Plaintiffs appeal from this judgment, and request a retrial of certain specified facts.

The facts upon which the case turns are, in the main, undisputed. Appellants urge two grounds in support of their contention that the lien of the mortgage is a paramount and first lien, and is not invalid as to Paschke, as found by the trial court. First it is claimed that by reason of a defective deed in Paschke's chain of title he is without any title or interest in the premises whatever. Second it is contended that, even if this deed is good, and he obtained title, nevertheless he is not a good-faith purchaser, and therefore took subject to plaintiffs' mortgage. Before considering these questions, —and they present the only questions in the case,—it will be necessary to state certain preliminary facts. It is agreed that Johnson was the fee-simple owner of the real estate in controversy when he executed the mortgage; also that the mortgage remained of record, and was unsatisfied, on December 24, 1898, when Paschke purchased the premises. The series of conveyances in his chain of title were all of record, and are as follows: A deed from Johnson to John P. Walker, dated October 30, 1895; a deed from John P. Walker to F. T. Walker, dated September 10, 1898; a deed from F. T. Walker and wife back to John P. Walker, dated November 17, 1898. Defendant Paschke purchased from John P. Walker, and his deed bears date December 21, 1898, but was not delivered until three days later. The record also showed the following transfers of the Johnson mortgage: An assignment from John P. Walker to John L. Cashel, trustee, dated November 27, 1897, and an assignment from John L. Cashel, trustee, to F. T. Walker, dated September 21, 1898. Under date of November 17, 1898, F. T. Walker, the record owner of the mortgage, executed a satisfaction thereof, which was delivered to the defendant Paschke when he purchased the premises on December 24th thereafter. Paschke relied entirely upon record title, and had no actual notice that plaintiffs either had or claimed any right or

interest in the mortgage in suit. The record showed that John P. Walker owned the land, and that F. T. Walker owner the mortgage. We now turn to the contention that Paschke has no title by virtue of his purchase. Appellants contend that the deed from F. T. Walker and wife to John P. Walker, defendants' grantor, is entirely void, and conveyed no title. So much of it as is important for the purposes of construction is as follows: "Know all men by these presents, that I, F. T. Walker, and Maggie J. Walker, his wife, of Sioux county, and state of Iowa, in consideration of the sum of one thousand (\$1,000) dollars in hand paid by John P. Walker, of Walsh county, North Dakota, do hereby quitclaim unto the said ———, all right, title, and interest in and to the following described premises," etc. The objection to this instrument is that it does not designate a grantee. If this is true, it is without validity and effect, for it is an undoubted rule of law that a deed of real estate, to be effective as a conveyance, must designate a grantee; otherwise no title passes. The designation of a grantee is just as necessary to the validity of the grant as the designation of the grantor and the description of the property. 9 Am. & Eng. Enc. L. 132, states the rule as follows: "The deed must designate the grantee; otherwise it is a nullity, and passes no title. If not named, the grantee should be so described as to be capable of being ascertained with reasonable certainty; and, if named, the name should be sufficient to identify the person intended, though it need not, as matter of law, be accurate in every respect." Numerous authorities have been cited by counsel in support of their construction of the deed under consideration, among which are *Vineyard v. O'Connor* (Tex. Sup.) 36 S. W. Rep. 424; *Bay v. Posner*, (Md.) 26 Atl. Rep. 1084; *Mardes v. Meyers* (Tex. Civ. App.) 28 S. W. Rep. 693; *Newton v. McKay*, 29 Mich. 1; *Hardin v. Hardin* (S. C.) 11 S. E. Rep. 102; *Allen v. Allen* (Minn.) 51 N. W. Rep. 473; *Allen v. Withrow*, 110 U. S. 119, 3 Sup. Ct. Rep. 517, 28 L. Ed. 90. These cases are in point only so far as they declare general rules of interpretation. In none of them was the deed being considered identical in language with that before us. It is a general rule, applicable to all written instruments, that courts, in construing them, will, when possible, adopt a construction which will give effect, rather than one which defeats them. This maxim of interpretation is embodied in section 5103, Rev. Codes. The Michigan court, in *Newton v. McKay*, supra,—a case quite similar to the case at bar,—uses this language: "It is undoubtedly true that, to constitute a valid conveyance, the grant must in some way distinguish the grantee from the rest of the world. But it is equally true that if, upon a view of the whole instrument, he is pointed out, even though the name of baptism is not given at all, the grant will not fail. The whole writing is always to be considered, and the intent will not be defeated by false English, or irregular arrangement, unless the defect is so serious as absolutely to preclude the ascertainment of the meaning of the parties through the means furnished by the whole document and such extrinsic aids as the law

permits. It is not indispensable that the name of the grantee, if given, should be inserted in the premises. If the instrument shows who he is, if it designates him, and so identifies him that there is no reasonable doubt respecting the party constituted grantee, it is not of vital consequence that the matter which establishes his identity is not in the common or best form, or in the usual or most appropriate position in the instrument." In the above case the grantor was named as party of the first part, and one Genereaux as party of the second part. The grantee's name did not appear in the granting clause. It was held that, inasmuch as no other name appeared in the instrument, Genereaux was sufficiently designated as grantee. The language which we have quoted from the opinion was expressly approved in *Vineyard v. O'Connor* (Tex. Sup.) 36 S. W. Rep. 424, and it states a generally accepted rule of construction. Tested by the foregoing, does the deed in question designate a grantee? We are clear that it does. It recites that the consideration was paid by John P. Walker. That fact alone raises a very strong, but perhaps not a conclusive, presumption that he was intended as grantee. But we do not rest our conclusion on this presumption. But three persons are named in the deed. The first two—F. T. Walker and Maggie Walker—are grantors. The other person named is John P. Walker. The deed, after reciting that the consideration is paid by John P. Walker, declares that the grant is "unto said —"; that is, to some person or persons theretofore named. The only person to whom it can possibly refer is John P. Walker, for the grantors could not convey to themselves, and no other persons are named. Through a clerical omission Walker's name was not repeated in the blank in the granting clause, but he had already been named, and, had the blank been filled, no other name than his could have been inserted. The language, as it stands, forbids it. Our conclusion is that the deed designates John P. Walker by name as grantee with entire certainty, and is, therefore, a valid instrument.

We will next consider whether the defendant is a good-faith purchaser in the sense that his title is protected against the lien of the mortgage in suit. It appears that the negotiations which resulted in the purchase of the premises by defendant extended through three days, and that Walker, the vendor, was at all times the moving party in the transaction. The several propositions for the sale of the property came from him. On the day prior to the consummation of the sale he executed and placed on record a deed to defendant Paschke, and provided a certified abstract of title showing the title as we have described it. This, together with a satisfaction of the mortgage in suit, was exhibited to Paschke to show that the title to the premises which he was about to purchase was good, and was unincumbered by the Johnson mortgage. The defendant, because of his ignorance of the English language, was not capable of examining the abstract himself, and so employed counsel to do so. After being advised that the title was good, and not before, he paid the purchase price, received his deed, and also the satisfaction of

the Johnson mortgage. It is entirely clear that he acted in good faith, and that he had no actual knowledge that plaintiffs were interested in the premises in any way, and that he relied upon the record title in making this purchase. Considerable evidence was introduced for the purpose of showing that the land was worth more than defendant paid for it. The conflict on this point we need not determine. It is unimportant. It is true that Walker was engaged in perpetrating a fraud, but it is entirely clear that defendant was not in collusion with him, and that he acted in good faith. Under such circumstances, the fact that he made a good bargain—if that is the fact—would not authorize us to deprive him of its fruits. See *Heyrock v. Surerus* 9 N. D. 28, 81 N. W. Rep. 36. Under this state of facts, which party to this litigation must bear the loss,—plaintiffs, who are the innocent purchasers of the notes secured by the mortgage, or defendant Paschke, who in good faith, and without actual knowledge of plaintiffs' rights, purchased the mortgaged premises? Both upon principles of equity and under the statutes of this state, plaintiffs must bear the loss, and this for the reason that by not taking and recording an assignment of the mortgage they made the commission of the fraud possible. This has been held in states where the recording of assignments was not compulsory. See *Bank v. Anderson*, 14 Ia. 544, in which the court, speaking through Wright, J., said: "A secret or clandestine assignment, whether by parol or upon the instrument itself, or by the transfer of the debt, and however honest the purpose, is liable to untold abuse. They ought, therefore, to be made a matter of public record. The spirit, if not the very letter, of our recording law requires it. Such a requirement can work no possible hardship, while the contrary rule can only be attended by evil, and that continually. Parties should not be permitted to leave their rights and interests in liens and real estate in such a condition as to injure those who are deceived by appearances without a record to guide them." This is upon the general principle "that, when one of two innocent persons must suffer by the wrongful act of a third person, he must suffer who left it in the power of such third person to do the wrong." *McClure v. Burris*, 16 Ia. 591; *Livermore v. Maxwell* (Iowa) 55 N. W. Rep. 37; *Williams v. Jackson*, 107 U. S. 478, 2 Sup. Ct. Rep. 814, 27 L. Ed. 529. And it is generally held that statutes which have for their purpose the better security and repose of titles may postpone one who voluntarily neglects to avail himself of the registry laws, which enables him to give notice to all the world of his claims to the claims of a subsequent purchaser who acted on the faith of the public record. *Kenyon v. Stewart*, 44 Pa. St. 179; *Jackson v. Lamphire*, 3 Pet. 288, 7 L. Ed. 679; *Insurance Co. v. Talbot*, 113 Ind. 373, 14 N. E. Rep. 586. Again, plaintiffs are under the ban of the statute as well as of judicial authority. Section 3594. Rev. Codes, provides that "every conveyance of real property, other than a lease for a term not ex-

ceeding one year, is void as against any subsequent purchaser or incumbrancer, including an assignee of a mortgage, lease or other conditional estate, of the same property, or any part thereof in good faith and for a valuable consideration, whose conveyance is first duly recorded." An assignment of a real estate mortgage is included in the term "conveyance" used in the section quoted, and is an instrument required to be placed on record. This section is a re-enactment of section 3293, Comp. Laws, and has been repeatedly construed by the Supreme Court of South Dakota, where it has continued in force, and held that an unrecorded assignment of a mortgage is void as to subsequent purchasers or incumbrancers of the mortgaged premises in good faith and for a valuable consideration whose conveyances are first recorded. In *Morrill v. Luce* (S. D.) 61 N. W. Rep. 43, an assignment had been executed, but not recorded. In *Merrill v. Hurley* (S. D.) 62 N. W. Rep. 958, there was merely a transfer of the notes, as in the case at bar. The same was true in *Pickford v. Peebles* (S. D.) 63 N. W. 779. In each case it was held that the failure of the purchaser of the notes to record an assignment of the mortgage defeated his right as against innocent purchasers, and such is the holding of all courts where a similar statute is in force. *Girardin v. Lampe* (Wis.) 16 N. W. Rep. 614. See cases cited in *Morrill v. Luce*, supra; also in *Windle v. Bonebrake* (C. C.) 23 Fed. Rep. 165. Plaintiffs neglected to take and record an assignment. Defendant purchased in good faith, and for a valuable consideration. It follows, therefore, both upon equitable principles and under section 3594, Rev. Codes, that plaintiffs cannot enforce their mortgage against the title he acquired by such purchase. The judgment of the District Court is affirmed. All concur.

(84 N. W. Rep. 350.)

JOHN J. CHILSON vs. W. F. HOUSTON.

Opinion filed October 29, 1900.

Deceit—False Representations—Question for Jury.

In an action to recover damages for a deceit practiced by the seller of a promissory note upon the purchaser thereof, consisting of false representations as to the financial condition of the maker of the note, which are alleged to have induced its purchase, the question as to whether the purchaser relied upon the false statements, and was induced thereby to purchase the note, is a question of fact to be determined by the jury.

Evidential Facts—Reliance Upon False Statements.

It is not necessary that the false statements and the acts of reliance thereon shall concur in point of time. It is sufficient if such false statements are the inducements causing a person to part with his property, and the length of time intervening between the time when the representations were made and the time when they were acted on is merely an evidential fact, to be considered by the jury in determining whether the false statements were relied upon.

Appeal from District Court, Richland County; *Lauder, J.*
 Action by John J. Chilson against W. F. Houston. Judgment for plaintiff.
 Defendant appeals.
 Affirmed.

F. W. Murphy and Charles A. Tuttle, for appellant.

Antecedent representations made by the vendor as an inducement to the buyer, but not forming a part of the contract when concluded, are not warranties. Benjamin on Sales, § 610; 2 Parsons on Contracts, 477; *Hopkins v. Tongueray*, 15 C. B. 130; *Halley v. Folsom*, 48 N. W. Rep. 219; *Sculley v. Bailey*, 1 H. & C. 405; *Bloss v. Kittridge*, 5 Vt. 28.

Freerks & Freerks, for respondent.

Under the evidence in this case the question of the right to rely, and of reliance by plaintiff on the false representations of the defendant in making the contract in question is one of fact and not of law. *Nash v. Minnesota Title Ins. Co.*, 159 Mass. 437, 34 N. E. Rep. 625; *Ingalls v. Miller*, 121 Ind. 188; *Christmas v. Frei*, 44 N. W. Rep. 329; *Hopkins v. Hawkeye Ins. Co.*, 57 Ia. 203; *Sim v. Pyle*, 84 Ill. 271; *Farr v. Peterson*, 91 Wis. 182. It will be presumed that the defrauded party acted in reliance upon the false representations when the contrary is not shown. Benjamin on Sales, §§ 382-390; Kerr on Fraud & Mistake, § 79; *Boyce v. Grundy*, 28 U. S. 210; *Connersville v. Wadleigh*, 41 Am. Dec. 214; §§ 3940-3942, Rev. Codes. This is not an action on contract of warranty but an action for deceit by which respondent was misled into making a disadvantageous contract. *Stanhope v. Swafford* 45 N. W. Rep. 403; *Phelps v. James*, 44 N. W. Rep. 543; *Andrews v. Jackson*, 37 L. R. A. 402; Benjamin on Sales, § 610; *Gustavson v. Rustemayer*, 70 Conn. 125, 39 L. R. A. 644; *Crane v. Elder*, 15 L. R. A. 795. Plaintiff was not bound to forget before the final trading all that had been stated to him six months before concerning the character of the note. "A lie six months old is quite as likely to mislead an innocent party to his damage as one hot from the liar's mouth." *Lindauer v. Hay*, 17 N. W. Rep. 98. A false affirmation, made by defendant with intent to defraud, whereby the plaintiff receives damage is ground for action, and it is not necessary that defendant should be benefited by the deceit or that he should collude with the person who is. *Pasley v. Freeman*, 2 Smith's Lead. Cas. 1; 3 Waite's Actions & Defenses, 452; *Crause v. Busaker*, 81 N. W. Rep. 406; *Bird v. Kleiner*, 41 Wis. 134; *Cotzhansen v. Simon*, 47 Wis. 473; *Lumber Co. v. Myhills*, 80 Wis. 541; *Beetle v. Anderson*, 98 Wis. 560. These are actions for damages for false and fraudulent representations inducing the making of contracts, and not contracts for breach of warranties, either embodied in or originally proven to form part of contracts. *Everton v. Miles*, 6 Johns. 139.

YOUNG, J. This action is to recover damages for a deceit alleged

to have been practiced by the defendant, whereby the plaintiff claims he was damaged. The complaint, in substance, alleges that on or about December 1, 1898, the plaintiff sold and deeded to the defendant a tract of land situated in Richland county, in this state, for and in consideration of the sum of \$1,228; that \$728 of the purchase price was paid to the Bank of Fairmount, pursuant to agreement between plaintiff and defendant, in cancellation of an indebtedness held by such bank against plaintiff; that, in payment of the balance due upon the purchase price of said land, the defendant sold and transferred to plaintiff a certain promissory note for \$500, executed by one W. T. Boutwell, and payable to the defendant, which note bore date October 19, 1897 and became due two years thereafter; that at the time of the sale of such note and prior thereto the defendant falsely and fraudulently represented to plaintiff that it was a good and collectible note, and falsely and fraudulently stated that the maker was solvent and worth at least \$7,000 in property, and that said note was perfectly good and would be paid promptly when due; that said statements and representations were wholly false, and known to be false by the defendant, and that the same were made for the purpose of deceiving the plaintiff as to the true character of said note and the financial condition of the maker; that plaintiff relied upon the representation so made as to the character of the note and solvency of the maker, and accepted the same for the balance of the purchase price of the land; that defendant was not acquainted with the maker of the note, and could not by the exercise of reasonable diligence ascertain its character, as defendant well knew; that the note was then and now is wholly worthless and uncollectible, all of which the defendant well knew; that the aforesaid statements and representations were made by the defendant to deceive the plaintiff and to induce him to accept said note, and that by such representations and statements the plaintiff was deceived and cheated, and induced to accept said note for the balance of the purchase price of his land. He lays his damage at \$500 and interest, and makes tender of the note to defendant. The defendant's answer admits the execution and delivery of the deed to him, and that he is the owner of the land. He also admits that he was the owner of the Boutwell note at the date alleged, and that he indorsed it to the plaintiff. All other allegations of the complaint are specifically denied. At the trial in the District Court the issues were submitted to a jury for determination, and a verdict was returned in favor of the plaintiff, assessing his damages at the sum of \$569. A motion for new trial was made and overruled. Thereafter judgment was entered. Defendant appeals from the judgment, and urges that the District Court erred in not granting his motion for new trial.

Counsel for defendant relies upon two alleged errors. The first is the denial of a motion for a directed verdict at the close of the case, which motion was upon the ground that the plaintiff had failed to prove facts sufficient to make out his cause of action. Counsel's

particular contention on this point is that under the facts as they appear in evidence the representations which plaintiff testifies were made could not, as matter of law, have been the inducement prompting plaintiff to part with his property, for the reason, as he claims, that they were remote in point of time, and wholly disconnected with the actual sale and transfer of the note in question. Before considering the question presented in the foregoing proposition, it will be necessary to set out some of the facts shown by the evidence: The defendant was interested in the Bank of White Rock, of White Rock, S. D. His home, however, was at River Falls, Wis., and he spent only a portion of his time at White Rock. Newell Powell, the cashier of the Bank of White Rock, was his son-in-law. The debt of \$728 which plaintiff owed to the Bank of Fairmount was secured by a mortgage on the land in question. Plaintiff left word with Powell that he wanted either to sell his land or borrow money on it. Shortly afterwards, and about May 1, 1898, the defendant called on the plaintiff in reference to the matter. All of the witnesses testify that defendant declined to make the loan requested, for the reason, as then stated, that he did not have the money. The witnesses also agree that he offered to buy the land, and in payment therefor to pay or assume the amount due the Bank of Fairmount, and to give plaintiff the Boutwell note, which he then had with him, and exhibited to plaintiff. Plaintiff declined the offer, and no sale either of the land or note was then made, or until a much later date. It was at this first meeting that the alleged false statements were made, upon which plaintiff relies for a recovery. It is not necessary to narrate the particular statements made by the defendant to plaintiff at that time concerning the financial standing of Boutwell, the maker of the note. The evidence is conflicting on this point, but it is not contended that such statements were not material, or that the jury were not justified by the evidence in finding that they were made as alleged. Defendant's sole contention is that they were too remote, and were not connected with the sale subsequently made. No further negotiations were had between the parties until early in the following December, when they met, and defendant again inquired whether plaintiff would take the Boutwell note for his land, and the offer was again declined by plaintiff. Defendant then stated that he was going to Wisconsin, and might possibly secure money there to make the loan which plaintiff desired, and that plaintiff could leave word with Powell as to what he wanted to do. Within a few days plaintiff informed Powell that he still wished to secure the loan from defendant. This was communicated to defendant, and he replied that he would make it. On the next day, however, and before the loan was completed, plaintiff informed the defendant, through Powell, that he had decided to take the Boutwell note for his land. The note was at once sent to plaintiff, and the latter executed and delivered the deed of his land. No statement of any kind was made by the defendant to plaintiff concerning Boutwell's financial standing subsequent to their first

negotiations on the 1st of the preceding May. It appears that in the intervening time plaintiff had not thought seriously of accepting defendant's proposition. Boutwell is of Indian descent, and lived on the White Earth Indian reservation, in Minnesota, when the note in question was executed, and for several years prior to that time. Before that he lived in Wisconsin. The defendant owned this note, and also another for the same amount. He personally secured the execution of these notes by Boutwell at White Earth. They were renewals of an old claim which defendant had held against Boutwell for years. How old it was is not certain, but he admitted it was from 7 to 17 years old when renewed in these notes. The jury were justified in finding that the note was worthless. Defendant knew Boutwell, both in Wisconsin and Minnesota. The plaintiff had no information concerning him, save that acquired from the defendant when the latter first proposed the sale of the note. Upon this state of facts the trial court was asked to declare, as a proposition of law, that the statements made by defendant in May as to Boutwell's financial standing were wholly disconnected with the subsequent sale of the note, and could not legally be relied upon by the plaintiff, or serve as inducement to him to make such purchase in December. This the trial court declined to do, and we think properly. The question which is decisive on this point is this: Did plaintiff rely and act upon the false statements to his damage? Whether he relied upon them is not a question of law, but a question of fact, purely. The question is not whether the false statements should have induced plaintiff to part with his property, but is this: Did they induce him to do so? This is always for the jury, where there is substantial evidence warranting the conclusion that the false statements were relied upon. We know of no principle of law which requires that the false statements and the reliance thereon shall concur in point of time. *Allen v. Truesdell*, 135 Mass. 75; *Lindauer v. Hay* (Iowa) 17 N. W. Rep. 98. As was said in *Morris v. People*, 4 Col. App. 136, 35 Pac. Rep. 188: "It is simply essential that the party make a false statement, and that the proof show that on account of it the goods were transferred. In other words, the misrepresentation must be the operative cause of the transfer." The remoteness or nearness of the misrepresentations to the sale go to their weight as evidential facts on the question whether they were the inducements to the sale. Of course, when there is no evidence that the false statements were actually relied upon, the court should direct a verdict, but that is not this case. The evidence shows that the plaintiff parted with his land for this note. He supposed he was getting the value of his equity, in the form of a good and collectible note. He knew of its value only through defendant's statements. In estimating its value he had nothing else to rely upon, and under these conditions it is absurd to say that the jury were not justified in concluding that he did rely upon what defendant had told him in May when he took the note in December. As holding that the question whether reliance was

placed upon the false statements is for the jury, see *Nash v. Trust Co.*, 159 Mass. 437, 34 N. E. Rep. 625; *Ingalls v. Miller*, 121 Ind. 188, 22 N. E. Rep. 995; *Christmas v. Frei* (Mich.) 44 N. W. Rep. 329; *Hopkins v. Insurance Co.*, 57 Ia. 203, 10 N. W. Rep. 605; *Sim v. Pyle*, 84 Ill. 271; *Farr v. Peterson*, 91 Wis. 182, 64 N. W. Rep. 863. For authorities in support of the proposition that false statements of fact, such as were made in this case constitute actionable deceit, and that damages directly resulting therefrom may be recovered, see *Andrews v. Jackson*, 168 Mass. 266, 47 N. E. Rep. 412, 37 L. R. A. 402; *Crane v. Elder* (Kan. Sup.) 29 Pac. Rep. 151, 15 L. R. A. 795; *Gustafson v. Rustemeyer*, 70 Conn. 125, 39 Atl. Rep. 104, 39 L. R. A. 644.

Counsel, while conceding that the evidence shows Boutwell's insolvency at the time the note was actually transferred, contends that it does not show he was insolvent when the representations were made in May. There is respectable authority holding that, where false statements have been made for the purpose of obtaining property from another, every step thereafter taken in the transaction is in itself a repetition of the falsehood. *State v. House*, 55 Ia. 466, 8 N. W. Rep. 307. So, also, it is held that where untrue statements have been made through mistake, and the person making them thereafter acquires a knowledge of their falsity, and before they are acted on, his mere silence gives to them a fraudulent character. *Porter v. Beattie*, 88 Wis. 22, 59 N. W. Rep. 499. In the case at bar, however, it is not necessary to resort to either of the above rules; for there is, we think, abundant evidence to show that Boutwell was insolvent, not only when the sale was actually consummated, but also in the previous May, when the representations were first made.

In the trial of the case, plaintiff's counsel in his closing argument to the jury, stated that plaintiff had rescinded the contract and made an offer to return the note. This was excepted to, and is assigned as prejudicial error. The offer was unnecessary and improper; for plaintiff's right to recover damages was based, not upon a rescission of the contract, but upon an affirmance of it, and we can readily see how a statement of this character might be prejudicial under some conditions. Counsel for plaintiff mistakenly assumed that it was necessary to return the note in order to recover damages for the deceit; for he not only made the statement complained of, but in his complaint made a specific offer and tender of the note to the defendant. The jury were not misled, however, for the court thereafter specifically instructed them that there had been no rescission of the contract, and, further, that if they found for the plaintiff his measure of damages would be the difference between what the note would have been worth had it been as represented, and what it was in fact worth at the time it was transferred. These instructions, we think, sufficiently corrected and cured counsel's statement. The motion for new trial was properly overruled. The judgment of the District court is affirmed. All concur.

(84 N. W. Rep. 354.)

STINA M. OLSON vs. M. J. O'CONNOR, *et al.*

Opinion filed November 3, 1900.

Evidence of Ownership—Opinion of Witness.

It is not error, in the trial of an action to recover damages for the conversion of property, to permit witnesses who are personally familiar with the facts upon which the ownership of such property is based to testify directly to the ownership of the same, as a fact. The rule is otherwise where the facts constituting ownership are complex, or are not all within the knowledge of the witnesses, so that the answer as to ownership involves the opinion or conclusion of the witnesses.

Facts on Which Conclusion is Based May Be Shown.

Ordinarily a statement as to the ownership of property is a statement of fact, and in such cases a direct answer is admissible. Where, however, it is a mixed question of law and fact, and a witness has answered against the objection that the question calls for a conclusion, the error may be cured by a disclosure of the facts upon which the conclusion is based, either in direct or cross examination.

Fraudulent Conveyance—Homestead—Married Woman's Separate Property.

The plaintiff, who is a married woman, sues to recover the value of a quantity of grain taken from her by the defendants as the property of her husband. It was grown on land to which she had title. Defendants requested the court to instruct the jury that if they found that her husband had transferred the title of the land to her to defraud his creditors, and she knew that fact, the transfer was void. *Held*, that the instruction was properly refused, inasmuch as it appeared that the land was a homestead.

Unintelligible Instructions.

A certain instruction examined, and *held* not vulnerable to the objection that it is unintelligible and erroneous.

Husband When Not Owner of Crops on Wife's Land.

The fact that a husband gratuitously devotes his time and skill to the management of his wife's land and the conduct of her farming operations does not operate to vest in him the title to the crops grown thereon.

Wife Owns Crops Grown on Her Own Land.

Both the plaintiff and her husband testified that she owned the grain which was taken by defendants, and stated the facts upon which her ownership rested, namely, that she owned the land, and raised it in her own right. *Held*, that the court did not err in refusing to direct a verdict for the defendants on the ground that the evidence showed conclusively that plaintiff was not the owner.

Appeal from District Court, Grand Forks County; *Fisk, J.*

Action by Stina M. Olson against M. J. O'Connor, sheriff, and Andy Jones. Verdict for plaintiff. From an order granting a new trial, plaintiff appeals.

Reversed.

John A. Sorley, for appellant.

When the sheriff seized the property in dispute he took it from the possession of plaintiff, who told him that it was her property. He therefore cannot justify his seizure under claim and delivery process against her husband. *Welter v. Jacobson*, 7 N. D. 32, 73 N. W. Rep. 65; §§ 2766-2767, Rev. Codes. The common law presumption does not prevail that when property is found in the possession of a husband and wife that it is the property of the husband. *Bookman v. Clarke*, 79 N. W. Rep. 159; *Oberfelder v. Kavanaugh*, 45 N. W. Rep. 471. The separate property of a married woman is not liable for her husband's debts because he gratuitously devoted his time and skill to the management of it, and because part of it had been accumulated through the labor denoted by him. *Deere, Wells & Co. v. Brown*, 79 N. W. Rep. 59; *Carn v. Rogers*, 8 N. W. Rep. 629; *Webster v. Hildreth*, 33 Vt. 457; *Burleigh v. Coffin*, 22 N. H. 118; *Feller v. Alden*, 23 Wis. 301; *Hoagh v. Martin*, 45 N. W. Rep. 1058; *Russell v. Long*, 3 N. W. Rep. 75; *Lewis v. John*, 24 Cal. 98; *Heartz v. Klieubhammer*, 40 N. W. Rep. 826; *Hosfelt v. Dill*, 10 N. W. Rep. 781; *Duncan v. Kohler*, 35 N. W. Rep. 594.

George A. Bangs, for respondents.

Where ownership of personal property, as in this case, is a material and ultimate fact to be determined, and is controverted upon the trial, the witness should testify to the principal facts within his knowledge which bear upon the question of ownership, and not give his mere opinion and conclusion thereon. *Brown v. Bank*, 42 Pac. Rep. 593; *Erickson v. Sophy*, 71 N. W. Rep. 758; *Farmer v. Brohan*, 71 N. W. Rep. 246; *Watrous v. Morrison*, 14 South. Rep. 805; *Hite v. Stimmel*, 25 Pac. Rep. 852; *Smith v. Cohn*, 32 Atl. Rep. 564; *Montgomery v. Martin*, 62 N. W. Rep. 578; *Nicolay v. Unger*, 80 N. Y. 54; *Newins v. Rose*, 33 N. Y. Supp. 1131. Plaintiff claimed title by virtue of her ownership of the land. Plaintiff's husband owned the land when the mortgage, under which defendants justify, was given. The land was deeded to plaintiff to avoid a judgment lien, with the knowledge of plaintiff, and no consideration used in the transfer. The burden was on plaintiff to show that her husband retained sufficient property to pay his debts, else the transfer was void as to defendants. *Haufman v. Nolle*, 29 S. W. Rep. 1006; *Ware v. Purdy*, 60 N. W. Rep. 526; *Waite, Fraudulent Conveyances*, § 412; *Booher v. Worrill*, 57 Ga. 235; *Redmon v. Chandley*, 26 S. E. Rep. 255.

YOUNG, J. Action in conversion to recover the value of a quantity of grain. Plaintiff claims as owner, and alleges that the grain in controversy was raised by her in 1896, and upon land of which she was the owner. Defendants admit the taking, and quantity and value of the grain, but allege as a complete defense that the same was not the property of the plaintiff, but was owned by Albert G. Olson, plaintiff's husband, and that the same was taken by the defendant O'Connor, as sheriff of Grand Forks county, under and

by virtue of certain claim and delivery proceedings which were based upon a chattel mortgage thereon executed and delivered by the said Albert G. Olson, the defendant in said claim and delivery action, to Andy Jones, the plaintiff therein. Jones is joined as defendant in this action. Thus it will be seen that the case turns on the ownership of the grain in controversy. It is conceded that, if plaintiff's husband was the owner, then the taking by the defendants was lawful, and plaintiff cannot recover; and, on the other hand, if plaintiff was the owner, such taking was unlawful, and plaintiff is entitled to recover. The case was tried to a jury, and a verdict was returned in favor of plaintiff. The defendants moved for a new trial, and this was granted. Plaintiff appeals from the order granting a new trial, and assigns the same as error. The motion was based entirely upon errors of law occurring at the trial. Accordingly the order sustaining the motion must stand or fall upon the result of our review of the alleged errors. There is nothing in the record to indicate what particular grounds the court relied upon in granting the motion. We will, however, consider all that appear of substantial merit.

Counsel for respondents in his brief submits five propositions in support of the order granting a new trial. They are as follows: (1) Error in the admission of certain testimony; (2) error in the failure to charge, amounting to a misdirection; (3) refusing to charge as requested; (4) error in the charge; (5) refusal to direct a verdict. A brief statement of facts is necessary to a consideration of these alleged errors. The grain in controversy was grown in 1896 upon a quarter section of land, which was then, and for five years prior thereto had been, occupied by the plaintiff and her husband as their homestead. The title to the land was in the plaintiff at all times since it was purchased. It was purchased with money derived from the sale of their former homestead. The title to this former homestead was in plaintiff when sold, and for four years prior thereto. Originally the title to it was in her husband. It appears that he transferred the title to her about the time a certain judgment was rendered against him, in favor of the Sandwich Manufacturing Company, in the District Court of Grand Forks county. On June 23, 1896, the defendant Jones secured the issuance of an execution on said judgment, and in company with a deputy sheriff visited plaintiff's residence and took steps towards making a levy. No levy was made, however. Instead, the defendant Jones and the deputy sheriff induced plaintiff's husband to accompany them to Grand Forks, and there, at the solicitation of defendant Jones, Olson executed the note and chattel mortgage in favor of Jones, which have been referred to, as the basis of the claim and delivery proceedings, covering the crop then growing upon his wife's land. The plaintiff was not present when the mortgage was executed. Neither did she authorize or ratify its execution. Olson testifies that he protested against giving the mortgage on the ground that the property was his wife's, and this is corroborated by the

scrivener who drew the chattel mortgage. Jones himself says that he had difficulty in getting him to sign a mortgage for so large an amount, and that Olson stated that the real estate was not his, but belonged to his wife, but did not say the chattel property was his wife's, and did say that the crop was his. This latter statement is opposed to the testimony of both Olson and the scrivener. The fact is not disputed that the plaintiff had the apparent legal title to the land upon which the grain in question was grown. It is also one of the undisputed facts in the case that the plaintiff and her husband, with their children, resided on this farm at all times here in question, and that the grain involved in this action was grown upon this land. As to the ownership of the grain, plaintiff testified that she owned the land, and that the grain was raised under her direction and control; that the actual labor was done by her husband, their son, and hired men; that most of it was done by her husband, who generally marketed the grain and brought her the money; that he usually made the purchases for the farm; that all disbursements were made by her, directly or through her husband, acting for her and at her request; that this was also the general method upon which she had conducted her farming operations for the nine years that she had title to the lands upon which they lived. Olson's testimony is to the same effect.

With these preliminary statements, we turn to the consideration of the errors upon which respondents rely to support the order granting a new trial. The first relates to rulings admitting answers to the following questions propounded to plaintiff in redirect examination: "(1) Q. For whom did Albert Olson work in 1896? (2) Then you are controlling and running the farm? (3) Q. Whose grain was it, raised there in 1896?" And this question asked of Albert G. Olson in his direct examination: (4) Q. You may state who was the owner of the crop?" The objection to each question was that it was incompetent and called for the conclusion of the witness, and counsel contends that the overruling of such objections was error. The first two of the above questions so clearly call for statements of facts, and not conclusions, that they do not require extended notice. Plaintiff's answer that her husband worked for her, and that she ran the farm, was a statement of fact, purely, and in no particular rested upon her opinion or inference. The other two questions call for a direct statement as to the ownership of the grain in controversy. Counsel's contention is that the answers to these questions were merely expressions of the opinions and conclusions of the witnesses, and were therefore objectionable, and he urges the governing rule that "when ownership is a material and ultimate fact to be determined in an action, and is controverted upon the trial, the witnesses should testify to the principal facts within their knowledge which bear upon such question, and not give their mere opinions and conclusions thereon." The rule as thus stated by the Court of Appeals of Kansas in *Brown v. Bank*, 42 Pac. Rep. 593, is in harmony with the current of authority. *Farmer v. Brokaw*,

(Iowa) 71 N. W. Rep. 246; *Simpson v. Smith*, 27 Kan. 565; *Hite v. Stimmel* (Kan. Sup.) 25 Pac. Rep. 852; *Montgomery v. Martin* (Mich.) 62 N. W. Rep. 578; *Bahe v. Baker*, 44 Ill. App. 578; *Nicolay v. Unger*, 80 N. Y. 54. Undoubtedly the foregoing authorities correctly state the rule where the answer of a witness as to ownership involves his construction of facts or his conclusion as to what they establish. In such cases it is erroneous to permit witnesses to testify to the ultimate fact of ownership, and by so doing compel the jury to return a verdict upon the opinions and conclusions of the witnesses, instead of the primary facts upon which ownership is based. But it is also the unanimous voice of these authorities that where the answer as to ownership is direct, but is subsequently qualified by a statement of the facts relative to it, or tending to show such ownership, and discloses the facts upon which the answer is based, the error is cured, and is not ground for reversal. The reason for this, as stated in *Nicolay v. Unger*, *supra*, is that "defendants would receive all the advantage which would flow from the evidence given in regard to what transpired between the parties, and it would not add to its weight or increase its effect by proof of the conclusion of the witness." *Steele v. Benham*, 84 N. Y. 639; *Miller v. Railway Co.*, 71 N. Y. 380. So if it was conceded that the questions objected to in the case at bar did in fact call for the conclusions of the witnesses, and not statements of fact, purely, we nevertheless would be compelled to hold that the error was not material, and furnished no ground for granting the motion; for it appears in the record that counsel for defendants by a prolonged and searching cross-examination developed every fact which could in any way bear upon the question of ownership, and plaintiff's claim thereto. But we are agreed that in this case, under the facts as they appear, these questions did not call for an opinion, but a statement of a fact, simply, and therefore come under the rule that where the question involves a fact clearly within the knowledge of the witness, and not the expression of an opinion upon facts proven, such question is admissible. *DeWolfe v. Williams*, 69 N. Y. 621; *Knappp v. Smith*, 27 N. Y. 277; *Sweet v. Tuttle*, 14 N. Y. 465; *Davis v. Peck*, 54 Barb. 425. In *DeWolfe v. Williams*, *supra*, the question objected to was this: "Whose was the property in the house at 516 Pacific street?" This was objected to "as a question of law." The objection was overruled, and witness answered that it was hers. The court held "that the question and answer were proper; that the title to property was ordinarily a simple fact, to which a witness having the requisite knowledge could testify to directly." In *Davis v. Peck*, 54 Barb. 425, the question involved was whether the plaintiff made a certain loan as receiver or individually. It was held that it was not error to permit him to answer in which capacity he acted. The court said that the inquiry embodied a fact within the knowledge of the plaintiff, and did not require the expression of an opinion on the law of the case. He, above all others, was in a position to know what the fact was. In *Knappp v. Smith*,

supra, which is in many respects similar to the case at bar, a wife, who was the plaintiff in the action, was asked this question: "For whom did your husband do what business he did after you took the deed?" This was objected to as calling for a legal conclusion. Her answer was: "I expected he was doing it for me." The court said: "Legal considerations may, no doubt be involved in a question of agency. But prima facie the inquiry whether a person engaged in a particular employment was doing business on his own behalf, or as the agent of another, involves only the question of fact whether he had been employed by that other person, and it is therefore a competent question to put to such person." In the case now under consideration the question of ownership was not a mixed question of law and fact. It rested upon two precedent facts, namely, that plaintiff owned the land, and that she herself produced the grain in controversy on said land. These facts were peculiarly within the knowledge of both the plaintiff and her husband, and when they testified that the plaintiff was the owner of the grain they did not give a conclusion or an opinion, but stated a fact within their knowledge. If these precedent facts were true, it conclusively followed that she owned the grain, and her ownership was a fact, and it was competent for her to so testify, subject to cross-examination, of course, as to the existence of the precedent facts. This case is not to be confounded with those where the answer of a witness does in fact involve the expression of an opinion or his conclusion or legal inferences. In such cases the objection urged would be proper. But in this case both witnesses knew who owned the land and who raised the crop, and could state from their own knowledge therefrom who was the owner of it; and this not as the statement of an opinion, but of a fact. And the test always is whether the answer calls for an opinion or a fact. The peculiar facts of each case must determine the rule to be applied. The one most generally applicable in actions for conversion is that stated in Abb. Tr. Ev. 623. It is this: "A witness may testify, directly, in the first instance, who owned the property, if he can do so positively, and not as mere opinion." The court did not err in admitting the evidence complained of.

The specification of errors as to the instructions may be treated under two heads: The first, failure to charge as requested; the second, error in the instructions given. Counsel for defendants asked the court to instruct the jury that if they found that the transfer of the land by Albert G. Olson to his wife, the plaintiff herein, was made to defeat the claim of the defendant, and that plaintiff had knowledge of such intent, then such transfer was void and conveyed no rights to her, and the defendant would in that event stand in the same position towards the grain in controversy as though no transfer had been made. Other requests similar in nature were asked. All of them were refused. And we are entirely clear that the court properly refused them, for there are no facts in the case calling for such instructions. In the first place, there never was a transfer of the title of the land on which this crop was grown from

Albert G. Olson to the plaintiff. Olson never had title to it. It belonged to her from the date it was purchased. The only transfer made was nine years before. But that was his homestead, and was exempt. It was property to which the lien of the judgment did not attach, and was beyond the reach of an execution issued thereon. It was not possible to defraud his creditors by transferring the title to his wife, for it was property to which they could not look for the collection of the claims. For these reasons, even in a proper case the transfer was not subject to attack. Counsel does not contend to the contrary. In fact, it is conceded that, so far as the actual title to the land is concerned, it is not vulnerable to assault because made in fraud of creditors; but, counsel contend that such transfer is void for the reason and to the extent that it affects the title to crops thereafter grown on such land, because to that extent, he says, it tends to hinder and delay creditors in the collection of their debts. Briefly, counsel's position is this: If Olson had not transferred the title to the land, he, and not plaintiff, would have been the owner of the grain subsequently grown thereon. As a statement of fact, this is true; but as a ground for claiming that the transfer of the land was in fraud of creditors, it is not sound. Its fallacy lies in falsely assuming that the transfer of the title then and there conveyed something of value other than the land itself, namely, the crops subsequently grown. Of course, Olson transferred to plaintiff nothing more than he had then, and that was the land itself. At that time these subsequent crops had no existence of value. By transferring the land to his wife he did not transfer crops afterwards grown. They were subsequent creations, which plaintiff claims she herself produced. Counsel's contention is equivalent to saying that under proper conditions property may be transferred by a debtor, and such transfer shall not be subject to attack as a fraud upon creditors, and in the same breadth declaring that the person obtaining it must not use it or profit by it. This proposition has no support in any principle known to the courts. The instruction requested was properly refused.

The following instruction given by the court was excepted to by defendants, and specified as error in the motion for new trial: "If from all the evidence in the case you believe that the plaintiff and her husband conspired together to defeat the payment of this mortgage by claiming that said property belonged to the plaintiff, when in truth and in fact it belonged to her husband, and that he in fact cultivated said land and raised said crop for his own use and benefit, and that he worked said land and raised said crop in his wife's name in pursuance of such collusive arrangement, then in that event your verdict should be for the defendant." Respondents' counsel criticises this portion of the charge as unintelligible, and also claims that it is erroneous. We do not think it is open to either objection. It was applicable to the evidence before the jury for consideration, and states the law entirely favorable to the defendants. If open to criticism at all, it is that it is too favorable to

them. By this instruction the jury were required to find for the defendants if they should find that plaintiff's husband cultivated the land and raised the crop for his own use and benefit. To reach this conclusion, it was necessary for them to find that the claim of the plaintiff and her husband, that the crop was hers was false and collusive, and the court correctly states that this was essential before a verdict could be found for defendants. Inasmuch as the plaintiff owned the land and was entitled to its use, the crops, presumptively, were hers. The right of her husband to crop the land, if it existed, must of necessity have been founded on a transfer of such right to him by the plaintiff in some form which the law would recognize as having that effect. The law applicable would have been more correctly stated if the court had instructed the jury that if they found from the evidence that plaintiff's husband had obtained from plaintiff the right to use the land for the cropping season of 1896, and had produced the crop thereon for his own benefit and on his own account, then he, and not the plaintiff, was the owner thereof, and the verdict must be for the defendants. The failure of the court to require the jury to find that Olson had a right to the use of the land for cropping purposes rendered the charge extremely favorable to the defendants.

The remaining error relied upon is the refusal of the court to direct a verdict for defendants. The ground of the motion was that plaintiff had failed to show that she was the owner of the grain, or that she was either in possession or entitled to possession. There are two particulars in which defendants claim that plaintiff failed. The first is that the evidence shows conclusively that she was not the owner of the land. This feature of the motion is based wholly upon the theory that the transfer of title by her husband was in fraud of creditors, and therefore void. This, as we have seen, is not tenable, and requires no further notice. The second ground is that the evidence shows conclusively that she did not cultivate the land and raise the crop. We do not so read the evidence. Both plaintiff and her husband testify that the crop was grown under her direction and control. It is true that plaintiff stated that her husband attended to practically all business details, and it appears, also, that he did most of the work on the farm, without compensation other than his living. But the mere fact that he devoted his labor and time to producing the crop, and did this gratuitously, has no legal efficiency to vest the title of such crop in him. The existence of the marriage relation did not remove the right to manage and control her own property which she had as a single woman. Section 2767, Rev. Codes, provides that "the wife after marriage has with respect to property, contracts and torts the same capacity and rights and is subject to the same liabilities as before marriage. * * *". It is now so well settled that the gratuitous contribution of a husband's time and skill to the management of his wife's property creates no title to its profits or increase in him, that the question is no longer debatable. See *Heartz v. Klinkham-*

mer (Minn.) 40 N. W. Rep. 826; *Duncan v. Kohler* (Minn.) 34 N. W. Rep. 594, and *Deere, Wells & Co. v. Bonne* (Iowa) 79 N. W. Rep. 59, and numerous authorities cited. It is clear that the trial court properly refused to direct a verdict for the defendants, and to have done so would have constituted reversible error. Our review of the record upon which the motion was based shows no error. It should have been denied. The District Court is accordingly directed to enter an order vacating its order granting a new trial. All concur.

(84 N. W. Rep. 359.)

ANNIE LOKKEN *vs.* W. G. MILLER, *et al.*

Opinion filed November 9, 1900.

Payment—Burden of Proof.

The plea of payment in an answer to a complaint for a liquidated demand confesses the cause of action, and casts the burden upon the defendant to sustain such plea.

What Constitutes Payment.

An obligation to pay money may, by agreement to that effect between the debtor and creditor, be discharged by the delivery to and acceptance by the creditor of the obligation of a third person. but the mere delivery of such an obligation by a stranger to the transaction, and without such agreement, does not have the effect of discharging the original obligation.

Appeal from District Court, Richland County; *Glaspel, J.*
Action by Annie Lokken against W. G. Miller and W. J. Miller, partners as Miller Bros. Verdict for plaintiff. Defendants appeal. Affirmed.

W. E. Purcell, for appellants.

Defendants' motion, made at the close of plaintiff's case, to direct a verdict in their favor, should have been granted because there was no evidence of a demand before suit for the money claimed. 5 Am. & Eng. Enc. L. 521; *Roody v. Ryler*, 24 Vt. 660. Where the contract in suit does not provide for the time of performance, demand and refusal must be alleged and proved. *Worley v. Mourning*, 4 Ky. 254; *Babb v. Babb*, 89 Ind. 281; *Powers v. Basford*, 19 How. Prac. 320. Plaintiff's objections to exhibits offered in evidence were too general to prove available. *Kolka v. Jones*, 6 N. D. 480; *Plano Mfg. Co. v. Persons*, 81 N. W. Rep. 897. Even valid objections made after the witness has answered must be overruled because it will be presumed that counsel waited for the answer to see whether it was favorable or unfavorable to him, a practice that cannot be tolerated. *Way v. Johnson*, 5 S. D. 237; *Vermillion Well Co. v. City*, 6 S. D. 467. It was prejudicial error in the conduct of the trial for plaintiff's counsel, in argument to the jury, to state that "individuals do not have fidelity bonds to protect them

from defalcations of their agents and elevator companies do have such bonds." *Lindsay v. Pettigrew*, 3 S. D. 197; *Brown v. Swinford*, 44 Wis. 282; *State v. McGahey*, 3 N. D. 293.

Freerks & Freerks, for respondent.

The defendants are liable for, and bound by the acts and statements of their agent in connection with the subject matter of his employment, although these were intended to defraud them as well as the plaintiff. *Mecham on Agency*, § 739; *Reynolds v. Witte*, 30 Am. Rep. 678; *Rhoda v. Annis*, 46 Am. Rep. 356. One who employs an agent or attorney should lose by his fraudulent or illegal act in preference to an innocent third party. *North River Bank v. Aymer*, 3 Hill. 262; *Mundorf v. Wickersham*, 63 Penn. 87; *The Monte Allegro*, 22 U. S. 644, 6 L. Ed. 181; *Baltimore Trust & Gas Co. v. Hambleton*, 40 L. R. A. 216. The record shows that a demand was in fact made before suit. As to the language used by plaintiff's counsel in argument, the court instructed the jury to disregard the same. This cured the error if any. *State v. McGahey*, 3 N. D. 293, 55 N. W. Rep. 753.

YOUNG, J. The defendant is a co-partnership. In 1898 it operated a line of public elevators in this state. One H. H. Hanson had charge of its elevator at Christine, and also of defendant's business at that point in buying and shipping grain. This action is to recover the sum of \$150 and interest, as due and unpaid, for 200 bushels of wheat sold and delivered to defendant by plaintiff in the month of February, 1898, at its elevator at Christine, at an agreed price of 75 cents per bushel, no part of which sum, plaintiff alleges, has been paid. The answer sets up the defense of payment, and that defense only. By this plea the issues of fact for trial were narrowed to the single issue of payment, and as to that the defendant had the burden of showing by competent evidence the fact that he had discharged the indebtedness, which is admitted by his plea of payment. On the proposition that pleading payment of a liquidated demand confesses the cause of action, and dispenses with the necessity of plaintiff proving his cause of action, and casts the burden of proving the payment so pleaded on the defendant, see *Caulfield v. Sanders*, 17 Cal. 569. In *Mohr v. Barnes*, 4 Col. 351, the court said: "The effect of the plea is to admit the original liability, and the burden of its discharge is assumed by the defendant." See, also, 16 Am. & Eng. Enc. Pl. & Prac. 168, and cases cited. The trial in the District Court resulted in a verdict for plaintiff for the amount prayed for in her complaint. Defendant made a motion for a new trial. This was denied, and the appeal is from the order overruling such motion. The motion was based entirely upon alleged errors of law occurring at the trial. All of these alleged errors, some 30 in number, are urged on this appeal as ground for reversing the order of the District Court. Upon the record pre-

sented we find it unnecessary to review any of the errors specified. No evidence was introduced by defendant in support of his plea of payment, and none of the errors complained of relate to the exclusion of evidence upon that issue. Plainly, plaintiff was entitled to a verdict, and there was nothing for the jury to determine. Under these circumstances we will not review the numerous rulings of which appellant complains, for, whatever conclusions we might reach as to their correctness, we would be compelled in each instance to hold that no prejudice followed. There is no evidence that defendant, or any one on its behalf, has paid plaintiff for the wheat in money. But it is the contention of appellant's counsel that the obligation of defendant to pay for the grain purchased was discharged by the execution and delivery to plaintiff of a personal duebill by Hanson for the amount due for the wheat. Hanson was a witness for the defendant. It appears that at the time he purchased this grain in question he was short in his accounts with his employer, and very soon thereafter was discharged. He testified that subsequent to his discharge, and about one month after the sale and delivery of the wheat, he executed and delivered to plaintiff his personal obligation for the amount due her for the wheat, in the form of a duebill. Counsel's position is that this presented a question of fact for the jury to pass upon under defendant's allegation of payment. We do not think so. Conceding that Hanson's statements are entirely true, did the delivery of the duebill have the effect of extinguishing defendant's admitted obligation to pay for the wheat? We are clear that it did not. It is true, a creditor, by agreement with his debtor, may take the note or obligation of a third person in payment of a debt in lieu of money. But the taking of such obligation is not payment unless so agreed (*Waydell v. Luer*, 3 Denio, 410); and where the obligation of a third person is taken for a precedent debt, as in the case at bar, prima facie it is no discharge of the original debt (*Ford v. Mitchell*, 15 Wis. 304, and cases cited). There is no evidence whatever of an agreement between the plaintiff and defendant touching the matter of the duebill. It appears to have been given by Hanson in furtherance of purposes of his own, and not connected in any way with any agreement between the debtor and plaintiff. Under these circumstances the delivery of the duebill by Hanson was the act of a stranger, and his agreement to pay was without consideration, and was without effect upon the existing obligation of the defendant to pay for the wheat purchased from plaintiff. The order overruling the motion for new trial is affirmed. All concur.

(84 N. W. Rep. 368.)

DAVID A. GREGG vs. CHARLES A. BALDWIN.

Opinion filed November 12, 1900.

Notice to Agent—Effect on Principal.

To charge a principal with knowledge or notice on the part of his agent, which said knowledge or notice came to the agent prior to his employment as such agent, it must appear that such knowledge or notice was present in the mind of the agent when he acted for the principal in the transaction in which the principal is sought to be charged with such knowledge or notice.

Appeal from District Court, Grand Forks County; *Fisk, J.*

Action by David A. Gregg against Charles A. Baldwin. Judgment for defendant, and plaintiff appeals.

Modified.

Cochrane & Corliss, for appellant.

Plaintiff took the negotiable note in suit in good faith, without notice of the alleged agreement, as collateral security for money loaned at the time the note was indorsed to him. He is a bona fide purchaser, and therefore protected as against the alleged offset. 4 Am. & Eng. Enc. L. (2d Ed.) 289, 290; § 5130, Rev. Codes. The doctrine of constructive notice has no application to negotiable paper no matter how careless one is in dealing with it. He can claim to be a bona fide purchaser without notice, unless the circumstances show *mala fides*. Mere negligence is not sufficient to effect his rights. 4 Am. & Eng. Enc. L. (2d Ed.) 299, 301; § 4884, Rev. Codes. Authorities are divided on the proposition whether notice to an agent in order to constitute notice to the principal should have been acquired during the time he was acting for his principal, or whether knowledge of facts obtained previous to his employment will be held to be the knowledge of his principal, on it appearing that such knowledge was before his mind at the time he was acting for his principal. 1 Am. & Eng. Enc. L. 1149, 1150; Mechem, Agency, § 721. The party who seeks to charge the principal with knowledge obtained by the agent before the agency has the burden of proof by clear and satisfactory evidence that there was present in the agent's mind a recollection of the knowledge previously obtained by him at the very time he acted for his principal. *Lebanon Savings Bank v. Hollinbeck*, 20 Minn. 322; *In re Distilled Spirits*, 11 Wall. 367; *Fairfield Savings Bank v. Chase*, 72 Me. 226; Mechem, Agency, § 721; *Yerger v. Barz*, 8 N. W. Rep. 769; *Slattery v. Schwannecke*, 23 N. E. Rep. 922; *Dresser v. Norwood*, 17 C. B. N. S. 466; *Red River Valley, Etc. Co. v. Smith*, 74 N. W. Rep. 194; *Trentor v. Pothén*, 49 N. W. Rep. 129; *Snyder v. Partridge*, 29 N. E. Rep. 851; *Burton v. Perry*, 34 N. E. Rep. 60; *Whittenbrock v. Parker*, 36 Pac. Rep. 374; *Constant v. University*, 111 N. Y. 604; *Wilson v. Minnesota*, 36 Minn. 112; 2 Pomeroy, Eq. Jur. § 673. In this state the strict and not the liberal rule as to

notice to an agent being notice to the principal, prevails. Section 4334, Rev. Codes, is a copy of § 1247 of the proposed New York Civil Code, and as appears from the notes of codifiers, was framed to express the strict rule. Although the paper be transferred after maturity set-offs between antecedent parties, which arose after the transfer, will not be available against the indorsee. 2 Daniels, Neg. Inst. § 1437. Baldwin was chargeable with notice because the paper was a negotiable instrument. *Hollinshead v. Stuart*, 8 N. D. 35.

Bosard & Bosard, for respondent.

Notice to Russell, appellant's agent, was notice to appellant. Plaintiff had actual or constructive knowledge of the contract securing the note in suit at the time he purchased. *Walker v. Flouring Mill Co.*, 35 N. W. Rep. 332; *Hovey v. Blanchard*, 13 N. H. 145; *Patten v. Ins. Co.*, 40 N. H. 375; *Hart v. Bank*, 33 Vt. 252; *Holden v. Bank*, 72 N. Y. 286; *Brothers v. Bank*, 54 N. W. Rep. 786; *Fishkill v. Bank*, 80 N. Y. 168; *Slattery v. Schwannacke*, 44 Hun. 83; *City Nat. Bank v. Bank*, 32 Hun. 110; *Cragie v. Hadley*, 99 N. Y. 134; *U. S. v. Davis*, 2 Hill, 451. Notice or knowledge acquired by an agent in a prior transaction and present in his mind at the time he is acting as such agent is notice to the principal. *Distilled Spirits*, 11 Wall. 356; *Brothers v. Bank*, 54 N. W. Rep. 786; *Wilson v. Ins. Co.*, 30 N. W. Rep. 401; *Hovey v. Blanchard*, 13 N. H. 145; *Loring v. Brodie*, 134 Mass. 453; *Bank v. Town*, 36 Conn. 93.

BARTHOLOMEW, C. J. This case must turn upon a question of fact. It was tried by the court below, and is triable de novo here. Plaintiff sues upon a negotiable promissory note, as indorsee. Defendant pleads an inherent equity in the note, and alleges that plaintiff took it with notice of such equity. He succeeded in reducing plaintiff's recovery by the amount of such equity. The trial court found that plaintiff took the note with knowledge, and upon that question of fact the case hinges. On March 6, 1896, the defendant, Baldwin, purchased a half section of land from the Security Trust Company at the agreed price of \$4,500. He executed to the grantor five promissory notes for \$500 each, and two notes for \$1,000 each, taking a contract for a deed. The two notes last mentioned represented two mortgages then upon the premises, for \$1,000 each, which Baldwin was to pay as a part of the purchase price. One of the mortgages would mature late in the year 1896, and the grantor, by parol, agreed to get that mortgage extended for four years, or until 1901. A written memorandum showing that such extension was to be made was entered in the loan register of the Security Trust Company. The home office of this corporation was at Nashua, N. H., but the Western office and principal place of business was at Grand Forks, N. D., and the transaction in question was had at the latter office. In June, 1896, the North Dakota Milling Company executed and delivered to the Security Trust

Company its promissory note for \$25,000. This note the Security Trust Company sold and indorsed to the plaintiff, Gregg. At the same time, and as collateral security on its indorsement, it transferred to said Gregg a large number of notes held by it, and among others the note herein involved, being one of the \$500 notes executed by defendant as purchase price upon said land. As a matter of fact, the Security Trust Company failed to have the mortgage on said land that matured in 1896 extended as orally agreed. The holder foreclosed, and defendant, Baldwin, was compelled to incur extra expense, by way of costs of foreclosure and increased interest, to save said land from such foreclosure. It is this expense that he seeks to offset against the note, claiming that plaintiff had knowledge of such agreement for extension.

It is conceded that at this time the plaintiff, Gregg, was the president of the Security Trust Company, and a member of the executive board thereof, and that the transactions of the company, such as the sale of lands, were always intended to be, and as a rule were, submitted to and discussed in detail by the executive board, sitting at the home office of the company, in Nashua, N. H. It is urged that these facts raise a presumption of actual knowledge on his part. We may grant that such a presumption arises. Its force is not great, under the circumstances. It appears that the written contract with defendant was detained in the Western office. The register of loans was, of course, in that office. If the contents of the contract were transmitted to the Eastern office, that alone, without the memorandum upon the loan register, would convey no intimation of any agreement for extension. We have no reason to suppose that plaintiff or the executive board was ever apprised of that memorandum entry. The Security Trust Company was engaged in making loans upon real estate. The memorandum was simply a reminder that a loan was to be made upon that tract of land at a future date at 7 per cent. interest. Naturally the matter would not be reported until the loan was made. There is in the evidence Mr. Gregg's clear and emphatic statement that he knew nothing about such an arrangement. That statement is contradicted only by the circumstances already stated. In our minds, they are far from sufficient to overcome positive testimony.

But respondent insists chiefly that plaintiff must be charged with knowledge by reason of the knowledge of his agent. In the spring of 1896 one Russell was sent from its home office, as agent of the Security Trust Company, to investigate the condition of the Western office, and report the same to the home office. He had full authority to examine all books and papers in the Western office, and to investigate the value of all securities held in that office. The business of the office was at that time large, and loans aggregating about \$1,000,000 were then outstanding. The agent, Russell, entered upon the discharge of his duties, and continued therein until in June, 1896, when he and Mr. Clifford, an officer and general Western manager of the Security Trust Company, went East. The contract with Bald-

win, it will be remembered, was entered into in March, 1896; and the contract was in the vaults of the company, and the memorandum was upon its loan register, during the time that Russell was investigating the condition of the business of the Western office prior to the trip East. The evidence also shows that after the trip to the home office in June, 1896, Russell returned to Grand Forks, and continued his investigations until October, 1896. The note given by the North Dakota Milling Company to the Security Trust Company was sold to the plaintiff, Gregg, while Russell and Clifford were at the home office. It appears that, when the negotiation was being perfected, plaintiff requested Russell to select the notes that were to be transferred to Gregg as collateral security. Respondent insists that Russell became plaintiff's agent in the selection of such notes. Russell testifies to the contrary, and the facts are not inconsistent with the idea that plaintiff, knowing that Russell as agent for the Security Trust Company, had become familiar with the value of its securities, and having confidence in his integrity, was willing to accept such notes as he might designate. Of course, Russell could not be the agent of both parties in such transaction, because their interests were opposed. We shall assume, however, in respondent's favor, that Russell for the moment ceased to be the agent of the Security Trust Company, and became the agent of the plaintiff. It is urged that Russell knew of the agreement for extension made by the Security Trust Company with Baldwin, and of the memorandum in the loan register. Russell testifies that he learned the facts later, but the trial court evidently believed that he was mistaken in that, and we may accept the judgment of the trial court. It is clear, however, that the information obtained before that time was not obtained in the course of his employment as the agent of plaintiff, but was obtained when he was acting in another capacity. Notice to an agent while acting within the scope of his authority, and in reference to a matter over which his authority extends, is, by the unbroken line of decisions, imputed to the principal. But beyond that the authorities are not uniform. The present prevailing and constantly extending doctrine appears to be that knowledge or notice acquired by a person will be attributed to a principal for whom such person subsequently acts as agent, with certain restrictions and limitations. Our statute seems to voice this later rule. Section 4334 reads: "As against a principal both principal and agent are deemed to have notice of whatever either has notice of and ought in good faith and the exercise of ordinary care and diligence to communicate to the other." The time at which the notice is acquired would seem to be immaterial under this statute. The principle now generally recognized, upon which the principal is charged with the knowledge of the agent, is not that the agent for the purposes of the transaction is a vice principal, but that the duty rests upon the agent, in fidelity to his principal's interests, to communicate to such principal any knowledge that he may have that would affect such interests. This duty the law presumes the agent has performed. This obligation on the part of the agent to communicate to his prin-

principal knowledge possessed by him affecting his principal's interests cannot, of course, be measured in any manner by the time at which such knowledge was obtained. If such knowledge was obtained while acting within the scope of his authority, and in reference to a matter over which his authority extended, then the law conclusively presumes that it was imparted, and the principal cannot escape by showing that it was not in fact in the mind of the agent at the critical time when it should have been imparted. But, if such knowledge was obtained at a time prior to the entry upon the agency, then whether or not it was present in the mind of the agent at the time when he acted for his principal in the matter wherein such knowledge became material is generally a question of fact. A case may be conceived wherein the information is of such a character and of so recent a date that it "is impossible to give a man credit for having forgotten." But such cases are rare. In those courts which charge a principal with knowledge acquired by his agent prior to the employment of such agent, it is uniformly held that such knowledge must have been present in the mind of the agent at the time he acted for the principal in the matter wherein the latter is sought to be charged with such knowledge. This holding is based upon the recognition of the frailty of human memory, and the fact that no duty rests upon the agent to disclose knowledge that he has forgotten, or, which is the same thing, that was not present in his mind when its disclosure could have influenced his principal, provided the circumstances be such that the forgetfulness can in law be excused. For full discussions of this subject, see *Mechem*, Ag. § 721, and cases cited in the notes; 1 *Am. & Eng. Enc. L.* (2d Ed.) p. 1150, and cases cited in note 2.

In the case at bar the respondent relies upon the fact that Russell must have received knowledge of the details of the transaction between defendant, Baldwin, and the Security Trust Company after March 6, 1896, the date of such transaction, and prior to the time he went East, in June, 1896; and he urges that this fact furnishes strong evidence that the knowledge was present in Russell's mind when he acted as plaintiff's agent in selecting the collateral notes. That it is a circumstance of weight must be admitted. Its weight would be greater were the Baldwin transaction an isolated one, or one of a few. The evidence shows that it was one of many,—presumably, several hundred. Russell was examining them for the purpose of making a final report thereon. The evidence shows that he made memoranda concerning each transaction. He did not trust to memory. He knew that the details of so many transactions could not be carried in the mind. He testifies positively that at the time he selected the collateral notes there was no knowledge or notice present in his mind of any agreement or understanding upon the part of the trust company to procure an extension for Baldwin. His conduct corroborates his testimony. He was at that moment the agent of plaintiff. To him he owed the first duty. He was bound to select valuable collateral. He says he selected the Baldwin note because he knew Baldwin's reputation as a business man. Certain it is that,

if he knowingly selected a note in which inhered an equity that might defeat a recovery upon the note in part or entirely, he was guilty of gross bad faith to his principal. We think the simple fact, if it be a fact, that he received the knowledge in the manner indicated, is entirely insufficient to prove that such knowledge was present in his mind when he acted for plaintiff, when opposed, as it is, by his conduct and his positive testimony. It follows that plaintiff did not take the note in suit with notice of any inherent equities.

We have decided this case along the lines upon which it was presented by counsel. No claim is made that the offset would not be proper if plaintiff took with knowledge. The District Court of Grand Forks county is directed to so far modify its former judgment herein as to render judgment in favor of plaintiff and against defendant for the full amount of the one note for \$500 and interest as therein provided, with costs of both courts. Modified and affirmed. All concur.

(84 N. W. Rep. 373.)

WELLS-STONE MERCANTILE COMPANY *vs.* AULTMAN, MILLER & COMPANY.

Opinion filed November 9, 1900.

Deed of Trust—Reimbursement of Trustee

A general merchant in embarrassed financial circumstances executed a deed of trust for the benefit of his creditors. The deed was executed by the trustor, the trustee, and the beneficiaries. The trustee was authorized to close out the mercantile business, and to that end was authorized to purchase such staple goods to replenish the stock as would, in his judgment, the better enable him to close out the stock. The beneficiaries were to receive only the net proceeds of the estate after paying all expenses of executing the trust. *Held*, that the trustee had a right to reimburse himself for all expenses incurred in executing the trust before paying dividends to the beneficiaries, and that the purchase price of staple articles so purchased by the trustee to replenish stock constituted a part of the expenses of executing the trust.

Reimbursement of Trustee from Moneys Paid to Beneficiaries Under the Deed.

Where the trust estate had been exhausted, and such expenses remained unpaid, but large dividends had been paid by the trustee to the beneficiaries, that the trustee might, in equity, require the beneficiaries to refund sufficient from the dividends so received to reimburse him for such expenses.

Creditors Subrogated to Rights of Insolvent Trustee.

That where, in addition to the facts recited, it appeared that the trustee was insolvent, the creditors who had thus furnished such goods might be subrogated to all the equities of the trustee as to the trust property, including the right to require the beneficiaries to refund; and this, too, even where a portion of the goods was so delivered to the trustee after payment of the last dividend.

Appeal from District Court, Cass County; *Pollock, J.*

Action by the Wells-Stone Mercantile Company against Aultman, Miller & Co. and others. Judgment for plaintiffs. Defendant appeals. Affirmed.

Newton & Smith, Morrill & Engerud, Mills, Resser & Mills, for appellants.

This action arises out of the same subject-matter as the case of the same plaintiff against G. A. Grover, et al, 7 N. D. 460. On the 19th day of December, 1894, Grover executed a deed of trust to one Jones; Jones accepted the trust and qualified, and took possession of Grover's property. It is provided in this deed that Jones shall have power to continue the general merchandise business, sell the stock of merchandise at private sale in the usual course of trade, replenish the stock with articles of staple goods to the extent necessary to successfully continue the business. A dividend of 45 per cent. was paid to the creditors, and the report of the trustee at the time the last payment was made disclosed that he then held in his hands a net surplus of over \$10,000. Subsequently the assignee, Jones, distributed the money in his hands and closed the estate without paying the debt of plaintiff for goods sold and delivered to Jones, as trustee, to replenish the stock of merchandise while he was continuing the business. Plaintiff asked that it be subrogated to the rights of Jones, as trustee, that the defendants account for the respective sums received from Jones, as trustee, and that each of the defendants pay over to plaintiff such pro rata share of the sums received as should be necessary to pay the plaintiff's claim. It is well settled that the creditor cannot claim any lien on, or equitable right in, the trust estate, but must look entirely to the trustee and his individual property for his pay. *Wells-Stone Mercantile Co. v. Grover*, 7 N. D. 463. In case the trustee pays the indebtedness he may claim reimbursement from the funds in his hands. From such right arises an equity in favor of the creditor, under peculiar circumstances, to proceed directly against the trust property. *Hewitt v. Phelps*, 105 U. S. 393, 26 L. Ed. 1074. The peculiar circumstances referred to are where expenditures have been made for the benefit of the trust estate and it has not paid for them directly or indirectly, and the estate is either indebted to the trustee or would have been if the trustee had paid, and the trustee is insolvent or not resident so that the creditor cannot recover his demand from him, or will be compelled to follow him to a foreign jurisdiction. In such case the trust estate may be reached directly by a proceeding in chancery. In such instances the creditor is subrogated to the right of the trustee against the estate. *Hewitt v. Phelps*, 105 U. S. 393; *Wells-Stone Mercantile Co. v. Grover*, 7 N. D. 463 and cases cited in opinion. The parties may agree that the trustee shall not be held personally liable on the contract, that only the trust estate shall be chargeable with the debt. *New v. Nicol*, 73 N. Y. 127; *Gill v. Carmine*, 55 Md. 339-343. If the trustee distributes the estate, leaving unpaid any of the debts incurred by him in executing the trust, a court of chancery will subrogate the creditor to his

equity, and allow the creditor to follow in the hands of those who had received the property, the portion of the assets paid them by the trustee. 7 N. D. 464; *Clopton v. Gholson*, 53 Miss. 466; *Ferne v. Mayers*, 53 Miss. 458; *Guerry v. Caper*, 1 Bailey's Eq. (S. C.) 159; *Dowse v. Gorton*, 40 Ch. Div. 536; *Shearman v. Robinson*, 15 Ch. Div. 548; *Packard v. Kingman*, 67 N. W. Rep. 551.

Newman, Spalding & Stambaugh, for respondents.

Jones, as trustee, was authorized, under the deed, to contract the debt in controversy. He contracted with respondent upon the credit of the trust estate and not upon his own personal responsibility, and the credit was extended to the trust estate and not to Jones. Jones was authorized to bind the trust estate by his contract and the trust estate is bound for the payment of respondents' claim. *Rice v. Lane*, 44 N. E. Rep. 133.

BARTHOLOMEW, C. J. This is an action brought to compel the beneficiaries under a trust deed to return certain money received by them from the trust estate, to the end that the same may be applied in payment of certain liabilities incurred in the execution of the trust. On a trial to the court the plaintiff succeeded, and the defendants appeal, and ask a retrial of the entire case. This controversy, in a somewhat different form, was before us in *Mercantile Co. v. Grover*, 7 N. D. 460, 75 N. W. Rep. 911. The plaintiff sold goods to the trustee named in a trust deed, and has not received pay therefor. In the former action he sought to recover against these defendants and others, who are beneficiaries under the deed, upon the ground that they were in fact partners in conducting the trust business, and the trustee was their agent in purchasing the goods. This position was held by this court to be unsound, but in answering the contention of counsel that, if the plaintiff failed in that case, it was without remedy, we said that the trustee became personally liable on every contract made by him in the discharge of his trust. We also said: "It is true that the trustee may claim reimbursement from the funds in his hands for any proper expenditure made by him in the execution of the trust, and this equity is the foundation of the right of the creditor, under peculiar circumstances, to proceed directly against the trust property itself. See *Herwitt v. Phelps*, 105 U. S. 393, 26 L. Ed. 1072; *Clopton v. Gholson*, 53 Miss. 466; *Norton v. Phelps*, 54 Miss. 471; *In re Johnson*, 15 Ch. Div. 548; *Dowse v. Gorton*, 40 Ch. Div. 536; *Mason v. Pomeroy*, 151 Mass. 164, 167, 24 N. E. Rep. 202, 7 L. R. A. 771." And again we said: "Of course, the parties may agree that the trustee shall not be held personally on the contract, but that only the trust estate itself shall be chargeable with the debt. In such a case, if the instrument creating the trust authorizes this to be done, or even when it does not give such authority, if the circumstances are peculiar, the trustee is not bound, but the fund is. *Nere v. Nicol*, 73 N. Y. 127; *Gill v. Carmine*, 55 Md. 339, 342, 343." And still further, in speaking of the trustee, we said: "And if he should distribute the estate, leaving

unpaid any of the debts incurred by him in the execution of the trust, we have no doubt that a court of chancery would subrogate the creditors to his equity, and allow them to follow, in the hands of those who had received the property, the portion of the assets which had been paid to them by the trustee. And even while the trust property is still in the hands of the trustee, those who had dealt with the trustee as such might, under special circumstances, obtain a decree impressing upon such property an equitable lien in their behalf. See cases first above cited." Plaintiff in this action seeks to bring itself within some or all of these conditions. We restate a portion of the facts: One Grover, a general merchant doing business at Horace, in Cass county, became financially embarrassed. His property was incumbered by liens. He entered into an arrangement with creditors for an extension of time. In pursuance of such arrangement, he made a trust deed of all of his property to one Jones. The deed was executed by Grover as trustor, and Jones as trustee, and the creditors as beneficiaries under the trust. The trust deed contains the following language: "Said party of the second part shall take possession of said property and business of the said party of the first part, and shall sell, dispose of, and convert said property, and the good will of said business, into money, by and through said party of the first part, or such other person or persons as said party of the second part shall designate and appoint for that purpose, and in such manner and at such time or times as, in the judgment of the said party of the second part, will produce the most money; and that the net proceeds thereof, after payment of all costs and expenses of executing the trusts hereby established, shall be distributed among said creditors in the manner following, to-wit." Then follow provisions for pro rata distribution among secured creditors, and, when their claims are satisfied, then among unsecured creditors. We then find the following provision: "The said party of the second part shall have power to continue said general merchandise business and to sell the stock of general merchandise at private sale, and in the usual course of trade, and to replenish said stock of merchandise with such articles of staple goods as may be necessary to successfully continue said business; and such power shall continue so long as said party of the second part shall be of the opinion that the interests of said creditors will be best subserved by that method of executing said trust." The complaint in this action, after all necessary formal allegations, including the execution of the trust deed and the entry of the trustee upon his duties thereunder, alleges that said trustee applied to plaintiff to purchase certain staple goods to replenish said stock of general merchandise, and agreed that for goods so purchased he would pay plaintiff in the ordinary course of business out of the proceeds of said trust property, and that under such agreement plaintiff sold and delivered to such trustee staple goods and merchandise to replenish said stock in the amount of \$1,292.85, and that a balance of \$532.65, and interest from February 1, 1896, remains due and unpaid on said account. It also alleges that all of said trust estate has been exhausted, and the

trust closed, and a large amount of money arising from said trust estate distributed by said trustee to these defendants. It also alleges the insolvency of said trustee, and that he has no funds of said estate from which to pay the claim of plaintiff. Several of the defendants filed separate answers, but their general purport is the same, and consists of a denial of the special allegations of the complaint already referred to, and particularly denies that the trust estate has been closed out, and the trust terminated, and denies the insolvency of the trustee, alleges that he is indebted to the trust estate, and that judgment had been obtained against him. One answer also pleads the former judgment as an adjudication. It is also answered that at the time these defendants received their last dividend there was owing to plaintiff from the estate only the sum of \$234.82. One of the defendants demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action, and because it showed a defect of parties defendant. Objections to the introduction of evidence under the complaint were made for the same reasons, and we therefore first notice these points.

There is no merit whatever in the objection that the complaint shows a defect of parties. True, the trust deed discloses that there were many other creditors of Grover; but they were unsecured creditors, and have received nothing on their claims. The theory of this action is that these defendants have received money from the proceeds of the trust property which they cannot, in equity, withhold from this plaintiff. Of course, no such claim can exist against one who never has received anything from the trust property. And here it is germane to remark that the defense of former adjudication cannot prevail. As we have seen, the former action was brought against all the creditors of Grover on the theory of a partnership under the trust deed. The issues here raised were not, and could not have been, litigated in that case.

The complaint states a cause of action. True, it does not appear that these defendants ever assented to this particular purchase from plaintiff, but this is not an ordinary trust created by will or the act of the trustor and trustee alone. The beneficiaries expressly agreed to all the terms of that deed. They gave the trustee unlimited discretion in replenishing that stock of merchandise, and they, in terms, agreed that only the net proceeds of the estate, after paying all costs and expenses of executing the trust, should be distributed to them; and counsel concede that the purchase price of these goods received from plaintiffs constitutes a part of the expenses of executing the trust. We think the complaint also sets forth the particular grounds which relieve it from looking exclusively to the primary liability of the trustee. It alleges that he has no trust property in his hands, and that he is insolvent. It alleges that the goods for which payment is sought were sold and delivered to him as such trustee. We think this raises a presumption that the estate received the benefit of the goods. In that event, had he paid for the goods, he might have reimbursed himself before any distribution to the

beneficiaries. Nor was it necessary, as a matter of pleading, for the plaintiff to state the account between the estate and the trustee, in order to show that the trustee was not indebted to the estate, and so barred from reimbursing himself for expenditures from the trust estate. If the trustee was so indebted, that fact was matter of defense. It has been so pleaded by the answering defendants. The general principles which control in cases of this character are well stated in *Norton v. Phelps*, 54 Miss. 467-471, as follows: "The principle is that, while persons dealing as creditors with the trustee must look to him personally, and not to the trust estate, yet where the estate has received the benefit of expenditures procured to be made for it by the trustee, and it has not in any way borne the burden of these expenditures properly chargeable to it, and to fasten the charge upon it will do it no wrong, but simply cause it to pay for what it is liable to the trustee, or would be liable if he had paid it or should pay it, and because of the insolvency or nonresidence of the trustee our tribunals cannot afford the creditor a remedy for his demand, he may proceed directly against the trust estate, and assert against it the demand the trustee could maintain if he had paid or should pay the claim, and should himself proceed against the trust estate." It is true that this case, being subsequently transferred to the federal courts, the Supreme Court, in 105 U. S. 393, 26 L. Ed. 1072, decided the case differently; but the principle above quoted was expressly approved, and the Federal Supreme Court said: "The ground and reason for this rule is that the trustee has an equity of his own for reimbursement for all the necessary expenses to which he has been put in the administration of his trust, which he can enforce by means of the legal title to the trust estate vested in him; and that his creditor, in the cases supposed of his insolvency or absence from the jurisdiction, may resort to the equity of the trustee upon a principle of equitable substitution or attachment, for his own security." In *Mason v. Pomeroy*, 151 Mass. 167, 24 N. E. Rep. 203, 7 L. R. A. 773, it is said: "That is to say, where trustees who are authorized to carry on a business contract debts, they are not only liable personally for the payment of them, but the creditors may also resort to the trust fund, subject, however, to the rules of equity, as applicable to the facts and circumstances which may exist in any particular case. *Ex parte Garland*, 10 Ves. 110; *Ex parte Richardson*, 3 Madd. 138; *Owen v. Delamere*, L. R. 15 Eq. 134; *Cutbush v. Cutbush*, 1 Beav. 184; *Thompson v. Andrews*, 1 Mylne & K. 116; *Burwell v. Mandeville*, 2 How. 560, 11 L. Ed. 378; *Smith v. Ayer*, 101 U. S. 320, 330, 25 L. Ed. 955; *Jones v. Walker*, 103 U. S. 444, 26 L. Ed. 404; *Pitkin v. Pitkin*, 7 Conn. 307; *Lewin, Trusts* (7th Ed.) 217. It is, indeed, contended on the part of the plaintiffs that their right to resort to the trust property is a primary and original right, which exists independently of any right on the part of the trustee to be indemnified. *Wally v. Collins*, 9 Ga. 223. The view, however, which has prevailed in England, so far as the question has been discussed, is that the creditors may reach the trust property when the trustees are entitled to be indemnified therefrom.

and that the creditors reach it by being substituted for the trustees, and standing in their place. *In re Johnson*, 15 Ch. Div. 548; *Dowse v. Gorton*, 40 Ch. Div. 536." Under these authorities it is clear that plaintiff was entitled to recover in this case, unless the trustee was so far indebted to the estate that he would have had no right of recovery had he paid plaintiff's claim. We see no reason, and none has been suggested, why these principles should not apply after the distribution of the estate as well as prior thereto. In *Norton v. Phelps*, supra, the entire trust estate had been turned over to the beneficiary. In the case at bar the beneficiaries, by their express contract, agreed that they should receive only the net proceeds of the trust estate after payment of all expenses of executing the trust. If they have received the proceeds of the estate in violation of this contract, we know of no principle of equity that will permit them to retain such proceeds. Clearly, the complaint was sufficient upon this ground alone.

Plaintiff also sought to allege that by the contract between itself and the trustee the goods were sold in the exclusive reliance upon the trust estate, and that by such contract the trustee incurred no liability. The principle seems to be clearly recognized that under a contract of that character the creditor may proceed directly against the trust estate. *Gill v. Carmine*, 55 Md. 339; *New v. Nicoll*, 73 N. Y. 127. We express no opinion as to the sufficiency of the complaint upon this last point, or upon the proof under these allegations. The trial court evidently decided the case upon this theory; but, without intimating that the court was wrong in so deciding, we prefer to place our decision upon a more certain ground, but one that was not open to the trial court. Before this case was tried in the District Court, the case of *Scott v. Jones* had been tried in the same court, and judgment rendered against the defendant for the sum of \$1,000. In that case Scott represented the trust estate here involved, and the defendant Jones was the trustee here involved, and that action was brought to compel an accounting by the trustee. On the trial of this case the judgment in that case was admitted, which, of course, showed the trustee indebted to the estate. It followed that, under the authorities first above cited, had the trustee paid plaintiff's claim, he would have had no equity that would have permitted him to reimburse himself from the trust estate, because he was already indebted to that estate, and hence he had no equity to which this plaintiff could be subrogated. But Jones appealed from the judgment against him in the District Court, and at this term of this court we reversed that judgment, and dismissed the action as against Jones. See *Scott v. Jones*, 9 N. D. 551, 84 N. W. Rep. 479. The judgment in that case establishes the fact that the trustee is not and was not indebted to the estate. Section 5713d, Rev. Codes, requires this court not only to take judicial notice of its own judgments and records, but also of the fact that the case now before the court has connection with the one formerly decided by it. The case is here for trial *de novo*. We must try it upon the record before us and upon the facts, of which we must take judicial notice. We conclude, as did the

trial court, that the trust is closed, and the estate exhausted. There is no undistributed trust property. The trustee is insolvent. Unless the defendants are required to return funds received from the trust estate contrary to the terms of their contract, plaintiff is without remedy. The defendants are clearly liable. But they urge that in no event can they be held liable to the extent adjudged by the District Court, and for this reason: It is undisputed that a portion of the goods the purchase price of which plaintiff seeks to recover were delivered to the trustee after the payment by the trustee to the beneficiaries of the last dividend, and defendants contend that they cannot be held for expenses incurred subsequent to the payment of any dividend. We think that is not sound, although we find no express authority. The goods went into the trust estate, and augmented the estate by that much. They were undoubtedly absorbed in paying expenses growing out of the business. At the time the last dividend was paid, it is clear from the statement of the trustee then made that he supposed he was retaining ample in his hands to pay all expenses that had been or might be incurred. In that he was in error. He did not realize from the property as anticipated. If, under these circumstances, he had paid plaintiff's claim, and found himself without trust property from which to reimburse the outlay, we think in equity he could call upon these beneficiaries to reimburse him from dividends received. If the trustee had that equity, then, on principles already discussed, this plaintiff is subrogated thereto. The judgment of the District Court is affirmed. All concur.

(84 N. W. Rep. 379.)

GEORGE S. MONTGOMERY, AS RECEIVER, vs. W. H. HARKER.

Opinion filed October 25, 1900.

Mutual Insurance—Applications for Membership.

The securing of applications for membership and insurance in a purely mutual insurance company to a certain number and amount is required by section 3104, Rev. Codes, as a pre-requisite to the existence of the right to issue policies, and also to the right of the commissioner of insurance to issue the certificate of authority to do business, authorized by section 3090, Id. The taking of such applications is a necessary step in the formation of the corporation and is required to be done prior to the issuance of a certificate from the commissioner of insurance authorizing such corporation to commence business, and is not in violation of the provisions of the statute prohibiting the doing of an insurance business without such certificate.

Payment of Annual Sum When No Assessment Made—Credit.

Where a member of a mutual insurance company has obligated himself to pay such annual assessments as shall be made, not to exceed a specified sum each year, and in anticipation of an annual assessment pays to the treasurer the amount of an annual assessment in advance, and such assessment is not in fact made, the sum so paid stands to his credit, and he has a right to apply the same on an assessment for a succeeding year.

Appeal from District Court, Richland County; *Lauder, J.*

Action by George S. Montgomery, receiver of the Red River Valley Mutual Hail Insurance Company, against W. H. Harker. Judgment for plaintiff. Defendant appeals.

Reversed.

Redmon, Ink & Wallace, for appellant.

Persons claiming to have organized themselves into a corporation under the general law are not free from having their claim attacked collaterally when no articles of association are filed. *Abbott v. Omaha Smelting Co.*, 4 Neb. 416; *Childs v. Smith*, 55 Barb. 45. The corporation is deemed to exist from the time the certificate of incorporation prescribed by statute is issued. Thereafter the lawfulness of the existence of the corporation cannot be denied in any controversy, except in an action by the state to vacate its franchise. *Palmer v. Lawrence*, 3 Sand. 161; *Hunt v. Kansas-Missouri Bridge Co.*, 11 Kan. 412; 1 Thomp. Corp. § 219. There is a difference where a corporation is existing by special charter and there have been acts of user and where individuals seek to form themselves into a corporation under the provisions of a general law. In the latter case it is only in pursuance of the statute for such purposes that the corporate existence can be acquired. *Bigelow v. Gregory*, 73 Ill. 194, 201. The existence of a corporation formed under the general law must be proved by showing at least a substantial compliance with the statute. *Mokelumne Mill Co. v. Woodbury*, 14 Cal. 424; *Bigelow v. Gregory*, 73 Ill. 197; *Union Ins. Co. v. Cramer*, 43 N. H. 641; *Harris v. McGregor*, 29 Cal. 124; *Abbott v. Omaha Smelting Co.*, 4 Neb. 416; *Granby Mining Co. v. Richards*, 95 Mo. 106; *Kaiser v. Lawrence Savings Bank*, 56 Ia. 104; *Gent v. Manufacturers, Etc., Ins. Co.*, 107 Ill. 652. The taking by appellants of premium note and mortgage was doing an insurance business within the meaning of the state. §§ 3124 and 3131, Rev. Codes. The doing of such business was illegal. *State v. Hogan*, 8 N. D. 301, 78 N. W. Rep. 1051, and that consequently appellants' note and mortgage are void.

W. E. Purcell, for respondent.

Respondent's assignments of error are insufficient under Rule XII, Supreme Court Rules. *Henry v. Maher*, 6 N. D. 415; *Thompson v. Cunningham*, 8 N. D. 106; *Globe Investment Co. v. Boyum*, 3 N. D. 538; *O'Brien v. Miller*, 4 N. D. 308. All objections to the evidence in this record may be disposed of together. There are no objections. This case is another illustration of the fearful consequences of becoming addicted to the "incompetent, irrelevant and immaterial" all strung together habit, the appetite for which once acquired seems beyond cure. *Kolka v. Jones*, 6 N. D. 461. The question of the regularity of this incorporation was for the state. It has recognized the corporation by the issuance of its license to transact

business of insurance. *Taylor on Corp.* § 145; *Freeland v. Ins. Co.*, 94 Pa. St. 504; *Frost v. Company*, 24 How. 278. The state, which alone can incorporate, may waive the breach or acquiesce in the usurpation, the wrong being to the state and not to the individuals. *Lehman, Dore & Co. v. Warner*, 61 Ala. 455; *Bakersfield Ass'n. v. Chester*, 55 Cal. 99; *Humphrey v. Money*, 5 Colo. 282. Defendant was a promoter and member of this corporation. Having dealt with the corporation as existing in fact, he is estopped to deny as against the corporation that it has been legally organized. *Close v. Glenwood Cemetery*, 107 U. S. 466, 477; *McLynch v. Sturgess*, 32 Me. 288; *Battelle v. Northwestern Cement, Etc., Co.*, 33 N. W. Rep. 327; 4 Am. & Eng. Enc. L. 199. All the members of this company being co-insurers, and the deeds and obligations of contracts being mutual, the defendant cannot plead such failure in an action against him to enforce his liability as co-insurer. *Washburn Mill Co. v. Bartlett*, 3 N. D. 138, 54 N. W. Rep. 544; *Whitney v. Wyman*, 101 U. S. 392.

YOUNG, J. The plaintiff is the receiver of the Red River Valley Mutual Hail Insurance Company of North Dakota, a domestic insurance company organized in April, 1898, under chapter 14 of the Civil Code, with principal place of business at Walpeton. Plaintiff was appointed receiver by the District Court of Richland county on December 29, 1899, in an action instituted in that court by the commissioner of insurance of this state, and immediately thereafter took possession of the assets of said corporation. A large portion of the assets consists of assessments levied upon the members of the corporation by the directors, some 1,800 in all, and which plaintiff claims are unpaid. But one assessment was made. That was levied on September 11, 1899, and was 5 per cent. of the face amount insured by each policy. This defendant had a five-year policy for \$300, and this action is to collect \$15 assessed against him on such policy. The case was tried in the District Court without a jury. The court found for the plaintiff, and judgment was entered in accordance therewith. Defendant appeals from the judgment, and in a settled statement of the case embodying all of the evidence offered demands a trial anew of the entire case in this court. The evidence in the record is of considerable volume, and in some particulars is conflicting, but as to all facts which are decisive there is no conflict. The following facts are all that are material to a determination of the issues: On February 10, 1898, seven persons, residents of the city of Walpeton, executed articles of incorporation for the purpose of organizing the aforesaid corporation under chapter 14 of the Civil Code of this state. On February 23, 1898, said articles were approved as to form by the attorney general, and filed in the office of the commissioner of insurance, and on the same day, to-wit: April 23, 1898, the commissioner of insurance issued his certificate, reciting that said company had fully complied with all of the requirements of the

insurance laws of the state relating to said company, and that it was authorized to transact a hail insurance business from and after the date of such certificate. A certified copy of the articles of incorporation, together with a copy of the certificate of authorization, was filed and recorded in the office of register of deeds of Richland county on April 29, 1898. On March 1, 1898, the defendant signed and delivered to one H. F. Meeker a partly written and partly printed application for insurance in said company, which application stated that the amount of insurance desired was \$300, and for a period commencing March 1, 1898, and ending January 1, 1903, and gave the description of the lands to be covered by the policy. The application also contained the following: "I hereby apply for membership and insurance in the above-named company, and agree to pay all just assessments, not to exceed five per cent. of the face value of my policy or _____ dollars, per annum, to be governed by the articles of incorporation and by-laws of the company." On the same day, and as part of the transaction, the defendant delivered to Meeker a note in the following language: "On or before the first day of October, 1898, I promise to pay to the Red River Valley Mutual Hail Insurance Company of North Dakota the sum of fifteen and no-100 dollars, or such portion thereof as may be assessed on my policy by the officers of said company for payment of expenses and losses by hail according to the by-laws, rules, and regulations of said company, with interest at the rate of 8 per cent. per annum from the maturity hereof." This was secured by a chattel mortgage upon the crops to be insured, and was paid by the defendant to the corporation in full prior to the making of an assessment. In fact, no assessment was made in 1898, or other than that now sued on. About the 10th of May, 1898, a policy was issued and delivered to the defendant, corresponding with the application, and reciting that it is based upon his application. On the back of the policy there is printed a notice of the date of the annual meeting, and notice that by virtue of the policy the defendant is a member of the corporation. The articles of incorporation and by-laws are also printed thereon. On the back, too, these words appear, "Total liability of assessment, \$15." Section 6 of the bylaws provides that "any person wishing to become a member of this company shall sign an application containing an agreement to pay all just assessments, and shall give security for the same, as shall be required by the board of directors; provided, said sums do not exceed five per cent. of the amount insured, and as governed by the by-laws of the company and its articles of incorporation. He shall pay a membership fee of \$2." Section 17 provides that "there shall be but one assessment each year, and that for only such sums as may be required to pay the losses and expenses of the business done by the company." Another section provides a method for transferring the policy to other property, and another provides for cancellation of policies. Meeker did not have a certificate of authority from the commissioner of insurance, as provided for in section 3124, Rev. Codes, when he took the defendant's appli-

cation; neither was the corporation then authorized to do an insurance business. On September 11, 1899, the directors ordered an assessment of 5 per cent. upon the policy holders of the company, and due notice of such assessment was served on this defendant. There were some 170 unpaid losses for 1899, and an assessment was necessary to pay such losses. Do these facts establish the defendant's liability for the assessment demanded. He says not, and presents two reasons, which we shall now consider.

First, he contends that the policy upon which plaintiff predicates his right to recover is void. This contention is based upon the fact that Meeker, who took defendant's application, did not have a certificate of authority as required by section 3124, *Id.*; and upon the further fact that no certificate of authorization had at that time been issued by the commissioner of insurance, authorizing such corporation to do an insurance business. Briefly stated, his contention is that in procuring the defendant's application, without such precedent authority, the corporation, through its agent, was doing or attempting to do an insurance business contrary to the prohibitions of the laws of this state relative to doing insurance business, and he concludes therefrom that not only is the application void, but that the policy thereafter issued on such application is also void, and accordingly furnishes no basis for any legal liability. We have occasion to notice this position only to the extent of pointing out the reasons why, in our view, counsel is in error in claiming that the taking of the application by Meeker, without a certificate of authority, was in violation of the statute. The corporation in question is a domestic mutual insurance company. Article 4 of chapter 14 of the Civil Code, under which it was organized, relates exclusively to this class of corporations. The first section contained in article 4, § 3104, *Rev. Codes*, provides that: "No policy shall be issued by a purely mutual insurance company until not less than two hundred thousand dollars of insurance in not less than one hundred separate risks have been subscribed for and entered on its books." Section 3090, *Id.*, provides that the commissioner of insurance shall, after the attorney general has approved the form of the articles of incorporation, "make an examination to ascertain whether the company has in all respects complied with the requirements of law, according to the nature of the business proposed to be transacted by it, and if satisfied by such examination that the corporation has complied with the law he shall deliver to such corporation a certified copy of the articles of incorporation and a certificate to the effect that such corporation has complied with all the requirements of the law, which on being filed in the office of the register of deeds of the county where the principal office of the corporation is located, shall be its authority to commence business and issue policies; and such certified copy of such articles of incorporation and of such certificate may be used for or against such company with the same effect as the original, and shall be conclusive evidence of the fact of the organization of such corporation." Elsewhere in article 4 it is

provided that every policy-holder is a member of the corporation while his policy is in force (section 3105, Rev. Codes), and is entitled, when his policy expires, to a share of the net profits or surplus earned while his policy was in force; and is in like manner liable to pay his proportionate share of assessments levied by the company, in accordance with law and his contract, for losses and expenses incurred while he was a member. *Id.* § 3110. From the sections of the statute above quoted it will be seen that the corporation had no existence prior to the issuance of the certificate of authorization by the commissioner of insurance, which occurred on April 23, 1898. Prior to that time, of course, it could accordingly have neither officers nor agents. Up to that time all persons connected with the proposed corporation were merely promoters, proposed officers, or proposed members. One of the chief requirements of the statute to be performed before a single policy can issue is that a certain number of policies and a certain amount of insurance shall be subscribed for. This had to be obtained not only before a policy could issue, but also before the commissioner of insurance could issue a certificate of authority to do an insurance business; for his certificate is unconditional, and authorizes the issuance of policies. Plainly, this condition that the requisite amount of insurance shall have been subscribed is one which the commissioner is required to examine into before he makes his certificate. The procuring of such subscription in the form of applications for insurance and membership, such as the defendant executed, is, then, not prohibited, but is expressly authorized, by the statutes relating to the organization of this class of corporations, and does not constitute the doing of insurance business. Then, too, Meeker was not its agent. The corporation did not then exist. The defendant acted for himself in making application for membership and insurance in the contemplated corporation. After the certificate of authorization was issued, the corporation had an existence, and was authorized to do an insurance business. Prior to that time all acts done were those of individuals, and not those of the corporation, and related to the organization of the corporation. The defendant, in pursuance of his application for membership, received a policy. This was after the commissioner of insurance had issued his certificate of authority. By receiving and retaining such policy, the defendant became a member of such corporation, and subjected himself to lawful assessments for losses and expenses accruing during the life of his policy. The objection that the taking of defendant's application, which is in the nature of a subscription for insurance and membership, was doing an insurance business in violation of the statute is without merit.

But defendant claims that, in any event, he is not liable for the assessment sued on, for the reason that his entire legal liability to such corporation was discharged by the payment of the \$15 note before referred to, which sum so paid represented the highest and only sum he could, under his policy, be assessed for in any one year. Before considering this claim, it will be necessary to refer to sec-

tion 3108, Rev. Codes, which prescribes what payments shall be required from members of this class of corporations for indemnity afforded against losses. This section reads: "Mutual insurance companies shall charge and collect upon their policies the full mutual premium in cash or notes absolutely payable and may in their by-laws fix the contingent mutual liability of its members for the payment of losses and expenses not provided for by their cash funds; provided, that such contingent liabilities of a member shall not be less than a sum equal to and in addition to the cash premium written in his policy. The total amount of the liability of a policyholder shall be plainly and legibly stated upon the back of each policy." The language of the section just quoted is unambiguous, and plainly requires the corporation to charge and collect a fixed premium from each of its members. This may be cash in advance, or a note payable absolutely. But it is an absolute and unconditional payment; a premium, in fact; and is to be written in the policy. The funds derived from such premium constitute a cash fund subject to be used for the payment of losses and expenses. As to the further liability of the members for losses and expenses not provided for by such cash fund, the corporation is authorized to fix a limit, but is prohibited from making such contingent liability less than the amount of the cash premium. Such contingent liability is clearly in addition to the cash premium, and up to the limit fixed by the corporation, which in this case was 5 per cent. of the face of the policy, is entirely dependent upon a failure of the cash fund derived from absolute premiums to cover the amount of the expenses and losses of the corporation. If our interpretation of this section requires support, it will be found in the two succeeding sections, 3109 and 3110, which provide for the disposition of such surplus funds as might possibly accumulate from the payment of cash premiums. The statute plainly provides for a double liability. The first is absolute, namely, the cash premium fixed by the corporation, either in the form of cash paid in advance, or a note payable absolutely; the second, a contingent liability, also to be fixed by the corporation, but at an amount not less than the cash premium. The manifest purpose of requiring such corporations to charge and collect a full mutual premium is to protect the public against worthless insurance, and to afford to persons effecting insurance on the mutual plan adequate and reliable indemnity for losses. If the above requirement is complied with, the policy-holder does not have to look alone to the contingent liabilities of the other members, which are at best of uncertain value, for the payment of his loss, but has a definite and existing fund, accumulated either from cash exacted in advance or from notes payable absolutely. The record in the case at bar shows that this provision was entirely disregarded by this corporation, not only in its contract with this defendant, but it appears that no attempt at compliance with such requirement was made in any instance. No premium was fixed. The by-laws show that the extent of the promise exacted from members was that they would be liable

for an annual assessment of 5 per cent. on the face of the policies in case they should be necessary to pay losses and expenses. That is the extent of the promise made by this defendant. It is entirely clear that no liability became fixed, or legal demand against the defendant became absolute, until an assessment was made. An examination of the note executed by the defendant will show that it added nothing to the defendant's liability. In it he merely agreed to pay in pursuance of an assessment up to \$15, and that is just what he was obliged to do by the by-laws, which constituted a part of his contract. The promise to pay anything on the note was altogether contingent on an assessment. No assessment was made for 1898, or any assessment other than the \$15 assessment here involved. Does the fact that defendant paid to the treasurer of the company the sum which is now sought to be recovered before an assessment was made defeat plaintiff's right to recover? We think it does. When it was paid, the corporation had no legal claim against him. It was evidently paid in anticipation of an assessment for that amount for 1898. Had such an assessment been made, it certainly would have been applied in payment of it. But there was no assessment until 1899. During this time the money stood on the books of the corporation to the credit of the defendant, and he certainly had the undoubted right to insist, as he does, that it be applied on the assessment now sued on. For authorities holding that assessments paid in advance, or in excess of those legally levied, shall be credited on assessments subsequently made, see *Association v. Baldwin*, 49 Ill. App. 203; *Davis v. Purcher & J. A. Steward Co.*, 82 Wis. 488, 52 N. W. Rep. 771; *Insurance Co. v. Jarvis*, 22 Conn. 133; *McGowan v. Association*, 76 Hun. 534, 28 N. Y. Supp. 177; 2 Joyce, Ins. § 1262. We have assumed, for the purposes of this decision, without deciding the question, that the policy is valid, and that the assessment was legal. Even in that event, for the reason just stated, the plaintiff cannot recover. The judgment of the District Court is reversed. All concur.

ON PETITION FOR REHEARING.

A rehearing and reargument is requested in this case by respondent upon the ground that our decision was made upon "a misapprehension of the facts adduced in evidence and considered by the trial court." The petition is accompanied by a written stipulation signed by counsel for both parties to the effect that an assessment was in fact made for the year 1898, and that evidence of that fact was introduced at the trial in the District Court. The stipulation recites that the omission to include the same in the statement of case transmitted to this court was due to an oversight on the part of counsel for the appellant and respondent. Both parties request this court to consider the record as "amended and added to" so as to show the fact of the assessment, and also certain other facts, and ask us "to decide the said cause upon the merits as included in the entire record as so made." Briefly stated, we are requested to do two things: First, to permit the introduction of evidence in this court originally,

which is not certified here by the trial court; secondly, to retry the case upon the record as so added to. Neither request can be granted. The records upon which this court acts in the exercise of its appellate jurisdiction are made by the District Court, and it does not lie within the power of counsel or of this court to alter such records. The language of the Supreme Court of Nebraska in *Hoagland v. VanEtten*, 43 N. W. Rep. 422, is directly applicable. The court said: "The duty of settling bills of exception is imposed on the judge of the District Court before whom the cause was tried, and the Supreme Court must accept the bill certified to as correct. This court, in the exercise of its appellate jurisdiction, can take no action looking towards a correction of bills of exception wherein mistakes of the kind referred to in this motion and affidavit are alleged to have occurred. That duty devolves upon the judge of the District Court." In *Thuet v. Strong*, 7 N. D. 566, 75 N. W. Rep. 922, this court held "that the action of the court with respect to a review of a case cannot be controlled by counsel who, in a given case, see fit to ignore the statute and rules of court governing the settlement of statements of the case and the preparation of abstracts." Upon a proper showing and a timely application this court will transmit records to the District Court for correction. As was said in *Baumer v. French*, 8 N. D. 319, 79 N. W. Rep. 340, "Under certain circumstances the practice of sending down a record for amendment is entirely proper." See *Moore v. Booker*, 4 N. D. 543, 62 N. W. Rep. 607, and court rule 33 (74 N. W. Rep. xii). But the right to have the record sent back is not an absolute one. In *Coulter v. Railway Co.*, 5 N. D. 568, 67 N. W. Rep. 1046, the court, speaking through Corliss, J., said that: "After a case has been submitted to this court on the merits, and the work of investigation has commenced, parties will not be allowed the privilege of amending the record, except on condition of making a very satisfactory showing; and that showing must be made in this court, and this court will in all such cases determine whether, under the circumstances, the record should go back for correction." In this case we do not have occasion to decide whether, in any case, such correction can be made after decision filed. No request is made to remand the record to the District Court, where this power to correct alone exists. Respondent is content with asking an amendment at the hands of this court. This, of course, cannot be granted, and the petition for a rehearing must therefore be denied.

The real purpose of the request for a reargument and amendment of the record is to secure a decision on such questions as shall be decisive of the liability of some 1,300 other policy-holders in the defunct insurance company. Such a result, we can readily see, would be highly advantageous to respondent in his further duties as receiver. The questions involved, however, are of such importance that we cannot, with propriety, enter on a discussion thereof until they arise in an orderly and regular way.

(84 N. W. Rep. 369.)

SIMON RAVICZ *vs.* CLINTON G. NICKELLS.

Opinion filed November 20, 1900.

Action on Note—Pleading—Fraud—Burden of Proof.

In an action upon a negotiable note by an indorsee thereof, the mere allegation in the answer of fraud in the inception of the note does not throw upon plaintiff the burden of proving that he is a good-faith holder. That burden is thrown upon him only after the fraud has been established.

Answer—New Matter—Reply.

Where, in such an action the defendant sets up facts which constitute a claim in his favor for damages against the original payee in an amount in excess of the note, and asks to defeat a recovery upon the note by reason of such facts, the matter so pleaded is defensive merely, and requires no reply.

Party After Trying Case to Jury Can't Claim Equitable Relief.

Where a party sets forth facts by which he claims he has been damaged in a large sum, and goes to trial upon such facts before a jury, he cannot be heard, after verdict and judgment against him, to allege that the facts entitle him to equitable relief.

Appeal from District Court, Richland County; *Lauder, J.*

Action by Simon Ravicz against Clinton G. Nickells, administrator. Judgment for plaintiff, and defendant appeals.

Affirmed.

W. E. Purcell, for appellant.

The fact that the counterclaim is one for damages for tort, pleaded in an action on contract is immaterial. The question whether a counterclaim is proper or improper can only be taken advantage of by demurrer and not raised at the trial by motion. *First Nat. Bank v. Laughlin*, 4 N. D. 391, 61 N. W. Rep. 473. All defenses invalidating a contract which forms the subject-matter of an action, such as fraud, etc., are included under the general term "new matter." *New York Central Ins. Co. v. National Co.*, 20 Barb. 468; *Castree v. Gavial*, 4 E. D. Smith, 428; §§ 55 and 59, Chap. 113, Laws 1899. The counterclaim of the code being more comprehensive than set-off or recoupment authorizes resort by the defendant to causes of action not embraced in either of those defenses. *Vassear v. Livingston*, 13 N. Y. 248. It secures to defendant the full relief which a separate action at law or a bill of chancery would have secured him in the same state of facts. *Leavenworth v. Packer*, 52 Barb. 132; *Boston Silk & Woolen Mills v. Eull*, 37 How Prac. 299. Defendant pleaded facts sufficient to show that the note was obtained by fraud and that the consideration was illegal. This cast upon plaintiff the burden of showing that he was a holder in good faith, for value. *Cummings v. Thompson*, 18 Minn. 246. The prayer of the complaint is in effect for the cancellation of the note. If plaintiff obtained judgment against defendant for the amount of the note and

defendant obtained judgment against the plaintiff for the amount due on the note, this would amount to cancellation of the note, and defendant is entitled to a cancellation, although not in words asked for in his pleading. *Sigler v. Hidy*, 9 N. W. Rep. 374; *Smith v. Eals*, 46 N. W. Rep. 1110. Defendant had a present existing cause of action at the time suit was brought for the cancellation, surrender and possession of the note. That cause of action was connected with the subject-matter of this action, viz: the note itself. Replevin would lie for possession of the note. *Gray v. Shannon*, 7 Ia. 508; *Bush v. Broomes*, 125 Ind. 14; *Savery v. Hayes*, 2 Ia. 25; *Sigler v. Hidy*, 9 N. W. Rep. 374.

A. J. Bessie and L. B. Everdell, for respondent. (No. brief filed).

BARTHOLOMEW, C. J. Plaintiff brought this action to establish a claim against the estate of a decedent, pursuant to section 6407, Rev. Codes. There was a trial to a jury, and at the close of the testimony each party moved for a directed verdict in his favor. The court granted plaintiff's motion, and overruled that of the defendant. A motion for new trial was denied, and judgment entered upon the verdict. Defendant appeals.

The claim was upon a promissory note purporting to be executed by Maude D. Nickells to Daniel A. Bessie. Plaintiff claimed as the indorsee of said Bessie. By the answer the execution of the note by Maude D. Nickells, and the facts that she subsequently died testate, naming the defendant Clinton G. Nickells as the sole executor of her estate; that her will had been duly proved and admitted to probate in this state, and that the executor named had qualified and entered upon the discharge of his duties, and that the claim had been duly presented and rejected,—were admitted. Various defenses were pleaded, only two of which need be mentioned. Defendant pleaded fraud in the inception of the note, and also, and under the name of counterclaim, alleged that plaintiff was not a good-faith purchaser of the note, and that the payee, Bessie, fraudulently converted to his own use and embezzled an amount of property in excess of the note belonging to Maude D. Nickells, and for which he is indebted to the estate. The answer prays that the action be dismissed, and that defendant recover of the plaintiff the amount apparently due upon said note. At the trial the plaintiff introduced the note, bearing the indorsement of Daniel A. Bessie,—as to which no question is made in the case,—and rested. Defendant introduced no testimony. He urges that the court erred in directing a verdict for plaintiff, because it appears conclusively that plaintiff is not a bona fide holder of said note, and because there was an admitted counterclaim in the case. His first point seems to be based upon the proposition that, as he pleaded fraud in the inception of the note, plaintiff could not recover unless he proved as an independent fact that he was a good-faith purchaser. But such is not the law. Whether a technical good-faith holder or not, plaintiff is entitled to recover unless some defense to the note has been established. The mere allegation of

fraud throws no burden upon plaintiff. It must be proved. *Vickery v. Burton*, 6 N. D. 245, 69 N. W. Rep. 193, and cases cited.

To support the second point it is urged that the answer contained a counterclaim, to which no reply had been made, and hence it stood admitted. We think there was no counterclaim in the case, although the defendant so denominated it. We do not base this upon the fact that the matters pleaded arose in tort. That point could only be raised upon demurrer. See *Bank v. Laughlin*, 4 N. D. 391, 61 N. W. Rep. 473. But the claim set forth in the so-called counterclaim is based upon the torts of Bessie, and no cause of action in favor of the defendant's testatrix could possibly arise thereon against this plaintiff. However broad we make the definition of the word "counterclaim," the facts pleaded cannot avoid in this case, because, if they raise any liability, it is against another party. But an inspection of the answer shows clearly that the facts were not pleaded as a counterclaim. No affirmative judgment or relief as against plaintiff was asked. It was simply the ordinary case of seeking to defeat a recovery upon a note in the hands of an assignee. Undoubtedly, the pleading was vulnerable to a motion or a demurrer, but it was defensive merely, and not admitted by failure to reply. Defendant urges that, as the facts set forth in this portion of the answer would, if proven, defeat a recovery upon the note, they should be construed as an equitable counterclaim or cross bill for the cancellation of the note. The facts were pleaded at law, and damage to the estate of the deceased in the sum of \$2,000 predicated thereon. It is elementary that a party cannot pass from law to equity in any such manner. 11 Enc. Pl. & Prac. 896 et seq. But the facts pleaded would not entitle the defendant to a cancellation of the note even if held by the payee, Bessie. They furnish ground for an independent cause of action against Bessie, but could not defeat a recovery upon the note, even in his hands. There are other points made, but they have less merit than those already discussed. The judgment of the District Court is affirmed. All concur.

(84 N. W. Rep. 353.)

CURTISS SWEIGLE vs. J. C. GATES, *et al.*

Opinion filed October 23, 1900.

Taxation—Listing Property—Unknown Owners.

Action to quiet title, and construing section 1548 of the Compiled Laws: *Held*, that the requirements of said section, with respect to listing property for taxation, to the effect that the assessor shall list property in the name of the owner if known to him, and if not known to list the same to "unknown owners," is mandatory, and not merely directory.

Void Assessment Because Not in Name of Owner.

Held, that an attempted assessment of certain lots in the year 1887, under said section, the title to which is involved in this action, is

void for the reason that the assessor in listing said lots for taxation wholly disregarded said mandatory provisions of said section, and omitted to list the same in the name of the owner, or to "unknown owners," or to any person whomsoever.

Tax Deeds Voidable.

The county treasurer at the annual tax sale of 1888 sold the lots in controversy to satisfy the alleged taxes of 1887, which were based upon said attempted assessment, and subsequently, no redemption from such sale having been made, executed tax deeds of said lots based upon said sale, and delivered the same to these defendants. *Held*, that said tax deeds were executed and delivered without authority of law, and were voidable for that reason.

Voidable Tax Deed—Will Not Start Limitation.

Held, further, that such deeds being voidable for jurisdictional reasons, viz: for the non-assessment of the lots described in the same, were powerless to start the statute of limitations running, and hence that when the same were recorded they did not so operate, despite the fact that said deeds were recorded more than three years prior to the commencement of this action.

Notice of Tax Sale—Description of Property.

Said tax sale of 1888 was made pursuant to a published notice of sale, which is governed by section 1620 of the Compiled Laws of 1887. Said section required that the published notice should embrace "a list of the lands to be sold and the amount of taxes due." Upon the facts stated in the opinion, *held*, that said published notice did not embrace any description of the lots described in the tax deeds in question; and, accordingly, *held*, that the treasurer was without jurisdiction to sell said lots at said tax sale of 1888.

Tax Levy Void—Not Made in Specified Amounts.

The lots were again sold for taxes by the county auditor of Richland county at the annual tax sale made in the year 1892 for the alleged taxes thereon of the year 1891, and were never redeemed from such sale. On July 21, 1899, said county auditor executed and delivered to the defendants tax deeds of said lots based upon the sale of 1892, and such deeds were regularly recorded. It appears that the alleged taxes of 1891 are based upon an attempted levy of taxes made by the commissioners of Richland county at a meeting held on the first Monday in July, 1891, and that such levy was not made in specified amounts, as was required by the statute then in force. See section 6, chapter 100, Revenue Laws 1891. Said attempted tax levy was made pursuant to the provisions of section 1589 of the Compiled Laws, which section was not then in force. *Held*, that such attempted levy of the taxes of 1891 was wholly without authority of law, and that the sale made pursuant to such levy was made without jurisdiction to sell. Said last-mentioned tax deeds were made *prima facie* evidence of the regularity of all the tax proceedings, but such evidence was overcome and rebutted by the proof that the levy was void.

Appeal from District Court, Richland County; *Lauder, J.*

Action by Curtiss Sweigle against J. C. Gates and others. Judgment for defendants, and plaintiff appeals.

Reversed.

S. H. Snyder and Curtiss Sweigle, for appellant.

Defendants set up the statute of limitations, and also title in them-

selves, through tax proceedings. By pleading their tax titles defendants waived the defense of the statute of limitations and invited a trial upon the merits. *London, Etc., Co. v. Gibson*, 80 N. W. Rep. 205. At the time of the tax sale for the 1887 taxes section 1640, Comp Laws, was in force. This section was repealed by section 72 of the Revenue Law of 1890, and before defendant's 1887 tax deeds were recorded. The statute of limitations was repealed by the repeal of § 1640, Comp. Laws. *Shattuck v. Smith*, 6 N. D. 56, 69 N. W. Rep. 12. Section 1640, Comp. Laws was re-enacted in § 1269, Rev. Codes of 1895, which repealed § 72 of the 1890 Revenue Law. This suit was begun less than three years after § 1269 went into effect. The statute of limitations cannot run, though the deed is recorded, until there is a right of action for it to run upon. So long as the owner is in possession and keeps it the statute does not run against him but runs against the purchaser. *Blackwell on Tax Titles*, 838; *Baldwin v. Merriam*, 20 N. W. Rep. 250. The tax deed is without any seal of the treasurer affixed, and is not in the form prescribed by § 1639, Comp. Laws, and is void upon its face. *Black on Tax Titles*, 211; *Blackwell on Tax Titles*, 773; *Eaton v. North*, 20 Wis. 449; *Sturdevant v. Mather*, 20 Wis. 576; *Sullivan v. Merriam*, 20 N. W. Rep. 118; *Bendickson v. Fenton*, 31 N. W. Rep. 685; *Salmer v. Lathrop*, 72 N. W. Rep. 570; 25 Enc. 691, note 5. The fact that the law does not specifically provide the treasurer with an official seal does not excuse the absence of such a seal from the tax deed. *Bendickson v. Fenton*, 31 N. W. Rep. 685. The lots were not assessed to the owner in 1887, nor to unknown owners. The requirement that the property be assessed to the owner or unknown owner is mandatory and jurisdictional. *Black on Tax Titles*, 37; *Lague v. Boagni*, 32 La. Ann. 913; *Davenport v. Knox*, 34 La. Ann. 408; *Roberts v. First National Bank*, 8 N. D. 504, 79 N. W. Rep. 1052; *Blackwell on Tax Titles*, 929; *Milwaukee Iron Co. v. Hubbard*, 29 Wis. 51; *Himmelman v. Steiner*, 38 Cal. 175; *Abbott v. Lindenbower*, 42 Mo. 162; *People v. Castro*, 39 Cal. 65. The board of equalization raised the property valuation without notice to the owner. § 797, Comp Laws; *Power v. Larrabee*, 49 N. W. Rep. 734, 2 N. D. 141. The school tax was levied by percentages, the levy was not based upon estimates of the city auditor. § 922, Comp. Laws; *Wells County v. McHenry*, 7 N. D. 246, 74 N. W. Rep. 241; *Shattuck v. Smith*, 6 N. D. 56, 69 N. W. Rep. 10. The owner did not have full sixty days notice of the expiration of the redemption and the deed is void for uncertainty in that it is in the alternative, to-wit: "Time for redemption will expire December 31st or within sixty days after the service of this notice." *Clary v. O'Shea*, 75 N. W. Rep. 115; *Peterson v. Mast*, 63 N. W. Rep. 168. The law in force when the deed was applied for, governed. Hence, notice of the expiration of redemption was necessary. *Callahan v. Sweeney*, 21 Pac. Rep. 960. Where notice of redemption is not given the statute of limitations does not run in favor of the tax deed. *Slyfield v. Barnum*, 32 N. W. Rep. 270.

Receipts for subsequent taxes paid are not evidence, and defendants cannot recover the same without first providing that the taxes were legal. *O'Neil v. Tyler*, 3 N. D. 47, 53 N. W. Rep. 434.

Davis, Lyon & Gates, for respondents.

Appellant seeks under § 5630, Rev. Codes, to have the entire case reviewed in this court. He has not made a specification of particulars in the stated case, nor has he specified the questions of fact that he desires reviewed. The demand for a review of the entire case does not relieve appellant from the necessity of specifying the questions of fact to be reviewed. *Rick v. Bergsvendson*, 8 N. D. 578; *Hayes v. Taylor*, 9 N. D. 92, appear to hold to the contrary, but such holdings were unnecessary to the decision of said cases. The pretended settlement of a case by the trial court after appeal is void. *Carmichael v. Vandeburr*, 51 Ia. 225; *Moore v. Booker*, 4 N. D. 543, 62 N. W. Rep. 607. The tax deeds for 1887 were valid on their face. There was an assessment, meeting of the board of equalization at the proper time, a levy and sale. *Roberts v. Bank*, 8 N. D. 504, 79 N. W. Rep. 1049. The tax deeds are conclusive evidence of the regularity of all proceedings, excepting as to the objections raised in the pleadings. *Roberts v. Bank*, 8 N. D. 504; *Larson v. Dickey*, 58 N. W. Rep. 167. The deeds were recorded February 6th, 1891, and § 1640, Comp. Laws, governs as to the time within which an action can be brought. *Meldahl v. Dobbin*, 8 N. D. 115, 77 N. W. Rep. 280; *Roberts v. Bank*, 8 N. D. 504. This section was not repealed by § 72, chap. 132, Laws 1890, because said section refers to sales made pursuant to said act, and said act is prospective in its operation. *Wells County v. McHenry*, 7 N. D. 246, 74 N. W. Rep. 241. By alleging title in themselves and praying that they be adjudged the owners in fee of the premises, defendants have not waived the defense of the statute of limitations. In this state as may defenses are allowed to be pleaded as the defendant may have. § 5274, Rev. Codes; *Stebbins v. Larder*, 48 N. W. Rep. 847; *Lawrence v. Peck*, 54 N. W. Rep. 808; *Green v. Hughitt*, 59 N. W. Rep. 524; *Nollman v. Evenson*, 5 N. D. 344, 65 N. W. Rep. 686. The absence of any verification of the assessment roll does not invalidate the assessment. *Farrington v. Assessment Co.*, 45 N. W. Rep. 191; *Avant v. Flynn*, 49 N. W. Rep. 15; *Twinting v. Finley*, 75 N. W. Rep. 548. The lots not having been assessed to any person the assessment is presumed to be made to unknown owners. *Burdick v. Connell*, 69 Ia. 458. The unlawful action of the board of equalization cannot be made the basis of relief in equity, it occurred in the determination of a question of which the board had jurisdiction and will stand until corrected in a proper proceeding. *Railway Co. v. Seward*, 10 Neb. 211, 4 N. W. Rep. 1016; *Miller v. Hurford*, 10 Neb. 13, 12 N. W. Rep. 832; *Clarke v. Board*, 50 N. W. Rep. 615; *Pennsylvania Co. v. Crystal Falls*, 27 N. W. Rep. 6; *Lawrence v. Jancsville*, 50 N. W. Rep. 1102; *Nugent v. Bates*, 50 N. W. Rep. 76; *Harris v. Freemont County*, 19 N. W.

Rep. 826; *Pierre Water Works Co. v. County*, 5 Dak. 145. Where in fact an assessment levy and sale have been made the deed becomes conclusive evidence that all the attending steps were regular. *Bulkely v. Callahan*, 32 Ia. 461; *Eldridge v. Kuehl*, 27 Ia. 160; *McCready v. Sexton*, 29 Ia. 356; *Martin v. Cole*, 38 Ia. 234; *Ware v. Little*, 35 Ia. 234. Notice of expiration of time of redemption was unnecessary because the notice is required to be given the person in whose name the lands were assessed, and it would be an idle act to give notice to an unknown owner. *Tuttle v. Griffin*, 64 Ia. 455; *Chambers v. Haddock*, 64 Ia. 556; *Meredith v. Phelps*, 65 Ia. 118; *Walker v. Towne*, 65 Ia. 563; *Burdick v. Connell*, 69 Ia. 458. Notice was unnecessary because the law extending time for redemption does not apply to sales made prior to the passage of the act. *State v. Fylpaa*, 54 N. W. Rep. 599.

WALLIN, J. This action is brought to quiet the title to three city lots located in R. S. Tyler's addition to the city of Wahpeton. The District Court entered judgment in favor of the defendants, dismissing the action, with costs, and quieting the title in the defendants. Plaintiff appeals from such judgment to this court, and in the settled statement of the case plaintiff has demanded a retrial in this court of all the issues involved. The complaint alleges, in effect, that the plaintiff is the owner of the lots in question, and that the defendants claim some interest in the lots adversely to the plaintiff, and asks that the title be quieted in the plaintiff. Defendants answer jointly, and deny the plaintiff's ownership, and allege ownership in themselves. The answer further sets out the defendants' sources of title, and alleges, in substance, that the defendants became seised of their title under certain tax deeds running to the defendants, and which were executed and delivered to the defendants pursuant to certain tax sales made in Richland county, and that said deeds were so made and delivered, respectively, by the county treasurer and the county auditor of the county of Richland, as is hereinafter more particularly explained. The answer further pleads the statute of limitations in bar of the action, and in this behalf alleges that three of said tax deeds, one for each lot, were based upon the annual tax sale of 1888 for the taxes of 1887; that such deeds are dated on January 2, 1891, and were duly recorded on February 6, 1891, and that this action was not commenced until more than three years had elapsed after said deeds were recorded, and not until December, 1898. These deeds were executed and delivered by the county treasurer of Richland county. The answer further sets out, as a source of defendants' title, three other tax deeds, one for each lot, executed and delivered by the county auditor of Richland county. These last-mentioned deeds are based upon the tax sale of 1892 for the taxes of 1891, but were not issued or delivered until July 1, 1899. To each of the three tax deeds first above mentioned,—those based upon the sale of 1888,—when offered in evidence, plaintiff objected upon the ground that they were incompetent, irrelevant, and im-

material, and upon the specific ground that the treasurer was without legal authority to issue the same. Other specific grounds of objection to the deeds were stated, to which we shall not have occasion to refer.

We will first notice defendants' contention that the three-years statute of limitations, embraced in section 1269, Rev. Codes 1895, operates to bar this action. This question, in view of the very frequent and radical changes made in the revenue laws, presents considerable difficulty; but we have reached the conclusion, at least for the purposes of this case, that said section operates as a bar to this action, if the tax deeds now under consideration when recorded had the effect to start the statute running, and this question in its final analysis depends upon whether the county treasurer, who executed and delivered the deeds, had jurisdiction so to do. It is well settled that tax deeds which upon their face are void for jurisdictional reasons do not operate to start a limitation statute running; and it is also well settled, both upon principle and authority, that, where an officer executing a tax deed was without jurisdiction so to do, such deed will not start the limitation running, even if the deed be entirely regular upon its face. In other words, the want of legal authority to execute a tax deed may be demonstrated either by jurisdictional defects upon the face of the deed, or by evidence *aliunde*, showing such jurisdictional defects in the tax proceedings upon which the deed issues as are under the law fundamental to the tax.

What particular tax proceedings are deemed to be jurisdictional to a sale of land for taxes must in all cases depend vitally upon the terms of the laws under which a tax is sought to be assessed, but it is entirely safe to say that, under a system of taxation which is based upon an official assessment or valuation of property, no tax can be lawfully laid until the valuation has been made in substantial conformity to the statute governing such valuation. This court very recently had occasion to consider a tax deed based upon a tax sale made by the county treasurer, and resting upon a sale for the taxes of 1888. The deed in that case was considered with reference to the statute of limitations, and embraced substantially the same language as that found in the deed we are now considering. See *Roberts v. Bank*, 3 N. D. 504, 79 N. W. Rep. 1049. Commenting in that case upon the necessity of an assessment as a proceeding essential to a tax, this court said: "An assessment is, in the broadest sense, a jurisdictional requirement." In the case cited the fact of non-assessment did not appear upon the face of the deed, and yet the court held in that case that the deed was utterly void, and did not set the statute of limitations running. See authorities cited in the opinion. In that case there was not a total failure to assess. The defect there was that the sale of one-half of a lot was made to satisfy a tax based upon an assessment of the whole lot, but the case is authority for the proposition that an assessment must be a

legal assessment, and one that will justify the sale, and that it is not enough to show merely that an assessment, however illegal, has been made in fact. It has become elementary in tax proceedings that an assessment, in order to be valid, must be made substantially in accordance with the statute governing the assessment. True, certain of the directions of such a statute which are intended merely to secure order and system in the dispatch of business, and which cannot injuriously affect the interests of a taxpayer, are usually held to be merely directory, and their non-observance, therefore, will not invalidate an assessment; but, on the other hand, where statutory requirements are clearly intended for the protection of the citizen and taxpayer, such provisions are uniformly held to be mandatory, and their disregard will defeat the validity of the assessment. See *Cooley, Tax'n*, pp. 284, 285, and cases cited; 1 *Desty, Tax'n*, § 106.

In this case the contention is made that the treasurer was without authority to issue the tax deeds based upon the sale of 1888, and this contention rests upon the ground that the assessment of 1887 was illegal and void. The assessment roll for 1887 was put in evidence, and from it it appears that the lots were not assessed in the name of the owner, and further, that they were not assessed to "unknown owners." The column in the form of the return prescribed in the statute intended to be filled with owners' names, and headed "Owner," was left entirely blank in the space opposite the descriptions of all the lots. The assessment was governed in this feature by section 1548 of the Compiled Laws of 1887, which contains the following provision: "If the name of such owner be known to the assessor the property shall be assessed in his, her, or their name, if unknown to the assessor, the property shall be assessed to 'unknown owners.'" It is obvious, therefore, that this provision of the statute was wholly disregarded by the assessor, and the pivotal question upon this point is whether this statutory provision is mandatory, or whether the same is merely directory; and the solution of this question, under well-established rules of construction, will depend upon the further inquiry as to whether this feature of the statute was intended simply to facilitate the orderly dispatch of official business, or, on the other hand, its purpose was to throw around the taxpayer an additional safeguard.

We are of the opinion that this statute was passed wholly in the interest of the taxpayer, and therefore that the same is mandatory in its requirements. Under the statute, the taxpayer is advised that his name will appear opposite a description of his property in the tax return required to be made to the county auditor, unless it appears by an official statement written opposite such description by the assessor that the name of the owner is unknown. The requirement that the owner's name must be stated, when known to the assessor, is not more explicit than that which requires the assessment to be made to "unknown owners" in cases where the assessor is not advised and does not know the name of the owner. It does not at all satisfy the mandate of this statute to omit all

reference to a name in any case because the law specifically requires affirmative action on the part of the officer in all cases, and whether the name is or is not known to him. There is authority, based upon obviously sound reasoning, to the effect that where the law requires an assessor to list property in the name of the owner, if known, he will be presumed to have done his duty in cases where he omits the owner's name. The name being omitted, it will be assumed that the name of the owner was unknown to the officer, and hence was properly omitted from the return. But, under the statute controlling this assessment, such a rule could not apply, because the statute requires affirmative action in cases where the owner's name is unknown to the officers.

The taxpayer, finding no entry at all in the return in the column headed "Owner," has, in our opinion, the best of reasons for assuming that his lands are not included in such an assessment, and are not, therefore, lawfully assessed by such a return. See *Smith v. Davis*, 30 Cal. 537; *Smith v. Cofran*, 34 Cal. 310; *Himmelmann v. Steiner*, 38 Cal. 175; *Hewes v. Rees*, 40 Cal. 255; *Weltz, Assessm.* § 65. See *Desmound v. Babbitt*, 117 Mass. 233; *Abbott v. Lendenbouer*, 42 Mo. 162. In the case last cited the court uses this language: "The assessors have no jurisdiction to assess property otherwise than as the statute prescribes, and a void assessment (which is equivalent to no assessment at all) against the owner cannot be made the foundation of a sale and conveyance of his land even by legislative enactment." In this case the court held that a tax deed may by legislation be made prima facie evidence of title, but cannot be made conclusive as to matters which are essential to the exercise of the taxing power, and it is held, further, that an assessment is essential to a tax. Counsel for defendants cite *Burdick v. Connell*, 69 Ia. 458, 29 N. W. Rep. 416, and other Iowa cases, in support of the assessment in the case at bar. These cases are not cases directly involving the validity of assessments, and hence are not strictly in point; yet it will be conceded that the reasoning of the cases, if applied to an assessment, would support defendants' contention. We deem it to be our duty, nevertheless, to take the opposite view, and in doing so we have no doubt that our conclusions can be sustained on principle, and by a decided preponderance of judicial opinion.

The trial court found that an assessment in fact was made in 1887. We cannot, under the authorities, yield assent to this statement. No assessment which disregards provisions of law made solely for the protection of the taxpayer is a valid assessment, and hence such an assessment cannot be lawfully regarded as an assessment in fact. An assessment in fact which is not a legal assessment is a legal impossibility. True, the legislature had authority to declare by statute that an error in listing for taxation as to the name of the owner or any omission in this respect should not defeat the assessment, but no such curative statute existed when the assessment of

1887 was made. Section 1641, Comp. Laws, has no application to the facts in this record. Finally, upon this point, we hold that to give validity to the deeds in question would operate to deprive the plaintiff of his property without due process of law. The evidence discloses other serious defects in the assessment of 1887, but these need not be particularly discussed.

Turning, now, to the pretended tax sale upon which the deeds were issued,—the sale of 1888,—it is further contended that the sale was without legal authority, and gave the treasurer no jurisdiction to issue the deeds, for the reason that the notice of sale was vitally defective, in this: that the notice did not contain a description of the lots in question or either of them. That a sale actually made, but made without legal notice, in a case where the law requires notice, is invalid, and confers no authority to issue a tax deed, is elementary. Such a mode of transferring title to real estate would amount to confiscation, and is not tolerated by the law. The omission of a valid notice of sale is not, therefore, a mere irregularity of procedure which may be cured. See Black, Tax Titles (2d Ed.) § 205. The notice of the sale, as published, was put in evidence by the plaintiff, and the defect relied upon has reference to the description of the lots. The notice stated, in effect, that the property to be sold consisted of real estate situated in the county of Richland, "described as follows." The particular descriptions were set out in the manner following:

"Description.	Sec.	Acr.	Amt.
"Eagle Township 1887."			

Following this heading are several columns of descriptions of farm lands situated in townships. The first description of city or town lots in the notice begins with the following heading: "Village of Lidgerwood." Under this appears the heading "Lot," "Block." Under these headings were several columns, containing descriptions of town lots, and these continue, until we find the following heading in the notice: "R. S. Tyler's Addition." Under this heading we find the following:

"Lot.	Blk.	Amt.
4	2	4 08
5	"	4 08
6	"	4 08"

Unless the property in suit is described in the above description, the same is not described at all in the notice of sale. We are compelled to hold that the notice is wholly insufficient and void. The lots described in the pleadings and in the tax deeds are situated in "R. S. Tyler's addition to the city of Wahpeton." We find no such lots described in the published notice. The description of city or town lots, as has been shown, begins with the village of Lidgerwood, and under this heading a large number of city lots are described by lots and blocks. Next following such descriptions we find the heading, "R. S. Tyler's Addition." This heading, when considered in

connection with the lot numbers and block number, as above set out, fails entirely to locate or describe the lots in question. There is nothing whatever in the notice to indicate that the lots numbered below this heading are situated in R. S. Tyler's addition to the city of Wahpeton. On the contrary, the words "R. S. Tyler's Addition," standing alone, wholly fail as a description of real property; but in this case these words seem to fairly connect themselves with the description which is named next above the words "R. S. Tyler's Addition," viz: with the "Village of Lidgerwood." The entire notice, when most liberally construed, therefore declares that the lots attempted to be described are situated in R. S. Tyler's addition to Lidgerwood, and that such addition to Lidgerwood is within the county of Richland.

We will now proceed to consider the series of tax deeds issued to the defendants by the county auditor of Richland county, and bearing date the 21st day of July, 1899. These deeds purport to convey the lots above described, and are based upon a tax sale for the taxes of 1891. As to this series of deeds no question arises under any statute of limitations, and the only question which we deem it necessary to discuss or pass upon relates to the tax levy made by the county commissioners in the year 1891. We here quote from the abstract all the evidence bearing upon such levy which is found in the record:

"Plaintiff introduced in evidence commissioners' record of Richland Co., a record of the auditor's office, and particularly page 400, to show levy for 1891, which reads as follows:

"On motion, the county board made the following levy for the year 1891:

For Co. revenue fund.....	5	mills.
" road and bridge fund.....	1	"
For sinking and int. fund.....	1/2	"
Total	6 1/2	mills.

"The levy of the county revenue fund was based on the following estimated expenses for the ensuing year:

District attorney.....	\$ 1,100
County surveyor.....	50
County commissioners.....	1,750
Stenographer	300
Justice court.....	1,000
Books and stationery.....	1,800
Light, fuel, and repairing court house.....	1,500
Miscellaneous	2,000
Sheriff office.....	2,500
Coroner	400
Clerk of court.....	1,000
District court.....	4,000
Election expenses.....	1,000
Printing and advertising.....	1,500
Hospital and Co. poor.....	4,000
For redemption and interest outstanding warrants.....	3,400

Total

\$27,000

"Five mills valuation of \$5,500,000.....

\$27,500"

The question of law arising upon the testimony above set out is whether the attempted tax levy constituted a valid levy. A solution of this inquiry involves a consideration of the law regulating tax levies for counties which was then in force. The levy was governed by the provisions of the revenue law of 1890, and particularly section 48 of that enactment, as amended by section 6 of chapter 100 of the Laws of 1891. We first call attention to the following language of said section: "The county taxes shall be levied by the county commissioners at the time of their meeting in July of each year." The July meeting of the board occurred at that time on the first Monday in July. Comp. Laws 1887, § 579. Under section 44 of the 1890 tax law, the county board of equalization, consisting of the commissioners and county auditor, were required to assemble annually on the second Monday of July. After the county board of equalization completed its duties, the county auditor was required to send an abstract of the equalized tax lists to the state auditor on or before the 4th day of August in each year. Section 45, Id. After the action required to be taken by the state board of equalization is completed, the law required that the rate per centum shall be based by the auditor upon the valuation as finally fixed by the state board of equalization. Section 48, as amended. We call attention to these provisions of the acts of 1890 and 1891 for the purpose of showing that in the year 1891 the law required county taxes to be levied in advance of any action which could lawfully be taken by either the county or state board of equalization, and hence such levy could not lawfully be based upon any per cent. of the valuation made for the same year. The valuation itself was a later act than the levy; and hence to base a levy upon such valuation was a physical, as well as a legal, impossibility. Nevertheless the evidence shows that the commissioners in the year 1891 attempted to levy the county taxes for that year upon a basis of percentage. They resolved to levy five mills for county revenue, one mill for road and bridge fund, and one-half mill for sinking and interest fund. Thus it appears that the amount of money which would be realized from this attempted tax levy was wholly problematical, and would depend entirely upon the total equalized value of the taxable property, which value could not be ascertained until a date much later than the levy. But turning to section 6, Act 1891, we find that it plainly required that all county taxes should be levied in "specific amounts." This provision embraces a radical change in the mode of levying county taxes from that existing under the Compiled Laws. See sections 1589, 1591, Comp. Laws. Under the old system, the commissioners based their levy upon an equalized valuation, and did not meet to make such levy until the first Monday of September (sections 1590, 1591), prior to which time the action of the state board was certified to the county auditor. Again, section 6 of the act of 1891 requires not only that local taxes should be levied in specific amounts, but that such levies, as to county taxes, should be based upon "an itemized statement of the county expenses

for the ensuing year." This record shows that the itemized statement required was made and spread upon the record, but there was no attempt made to levy any tax whatever in a specified amount. On the contrary, the only language relating to any levy shows unmistakably that the commissioners were acting, or attempting to act, under the pre-existing statutes, and were attempting to levy a tax based upon percentages. The levy attempted to be made was in mills, and this would be meaningless, unless the language is considered in connection with some established basis of value. It is obvious, therefore, that the mode of levying the tax for 1891 was not only without authority of law, but was directly contrary to positive and plain provisions of the statute controlling the levy. The right to levy a tax is conferred by law upon county commissioners, but this right is carefully limited, and the mode of making the levy is detailed in the statute which delegates the right. Under the authorities, the manner or mode of making the levy is an essential part of the law, and must not, therefore, be radically departed from, but must be substantially adopted by the subordinate body to whom the right to levy is delegated. This court has passed upon the precise question presented in this branch of the case. See *Wells Co. v. McHenry*, 7 N. D. 246, 260-262, 74 N. W. Rep. 241. This case will be ruled by the case last cited, and hence we shall hold that the levy for the taxes of 1891, and upon which the 1899 deeds are based, was wholly void, and not merely irregular. There was therefore no jurisdiction in the county auditor to issue said last-mentioned deeds, and the same are therefore without effect, and conveyed no title to these defendants.

Respondents' counsel have made certain preliminary objections to any retrial of this case in this court, which objections are based upon alleged defects in the statement of the case and in the service of an abstract. We have considered said objections, and the same are overruled.

It follows from what has been said that the judgment of the trial court must be reversed, and the court below is directed to reverse its judgment herein, and enter a judgment in plaintiff's favor, vacating all of said tax deeds, and quieting the title to the lots in question in the plaintiff, as demanded in the complaint. The plaintiff will recover his costs and disbursements in both courts. All the judges concurring.

ON PETITION FOR REHEARING.

A carefully prepared and elaborate petition for rehearing has been filed in this case. The case was originally presented by foreign counsel, but since the decision in this court local counsel have been employed, and the greater part of the petition for rehearing was evidently prepared by local counsel. In so far as the petition relates to questions passed upon in the opinion handed down, we adhere to our rulings. Much of the petition, however, is devoted to grave and complicated jurisdictional and constitutional questions that were

in no manner presented to the trial court or to this court upon the argument, and we desire to take this occasion to condemn a practice that has become far too prevalent in this state, not that this case is more, or as much, open to the censure, as many other cases that we are required to consider, but because we desire the bar of the state generally to understand that it will hereafter be the rule of this court, from which departure will be made only in extreme cases, that no question will be considered upon a petition for rehearing that was not presented on the argument or decided in the opinion of the court. Our reason for the rule cannot be better stated than by quoting from adjudicated cases, citing first the language of Chief Justice Murray in *Andrews v. Hill Co.*, 7 Cal. 334: "This case may be said (without any disrespect to the counsel for the respondents) to be a fair illustration of a most pernicious practice which has sprung up among the bar in many instances, of presenting cases without that care and examination of the record which is necessary to a correct understanding of the case, and afterwards trusting to the indulgence of the court by way of a petition for a rehearing. In fact, so common has the practice become that the idea that a reargument will be granted as a matter of course seems generally to obtain, and petitions are filed in almost every case that is decided. I have had occasion to observe in the last two years that the best, and in many instances the only, arguments which were made in cases before us were in the form of petitions for rehearing. Such a practice does great injustice to the bar and the court, and frequently imposes upon us double labor, besides giving to the decisions a seeming contradiction." And in *Dougherty v. Henairie*, 49 Cal. 686, which was an attack upon a tax deed, the court said: "The sufficiency of the deed in this particular not having been questioned at the argument or in the briefs of counsel, we decline to consider the point now. The proper dispatch of the business of the court requires that counsel should state the grounds on which they rely in their briefs, and not reserve other points to be set up in a petition for a rehearing, after a decision of all the cause." In *Ramsey v. Barbaro*, 12 Smedes & M. 209, the court said: "We cannot grant rearguments on points or questions not raised in the first argument or assigned for error. This would be tolerating experiments on the judgment of the court, and trying cases by halves." In *Knoth v. Barclay*, 8 Colo. 306, 7 Pac. Rep. 289, the court said: "It is the duty of counsel to present all questions upon which they rely in their briefs and arguments in the first instance, and the court, in reviewing the cause, does not usually go beyond the subjects to which its attention is thus invited. It would be obviously unfair to permit the presentation of such questions as the one now before us at this stage of the proceedings. Counsel are not permitted to present part of their case at the formal submission, and the remainder upon the petition for a rehearing." See, further, *Rogers v. Laytin*, 81 N. Y. 642; *Weil v. Nevitt*, 18 Colo. 17, 31 Pac. Rep. 487; *U. S. v. Hall*, 11 C. C. A. 294, 63 Fed. Rep. 475;

Tolman v. Bowerman, 6 S. D. 207, 60 N. W. Rep. 751. Petition denied.

(84 N. W. Rep. 481.)

H. D. SCOTT vs. ALBERT E. JONES.

Opinion filed November 9, 1900.

Trustee—Error of Judgment—Liabilities.

A trust deed declared that the trustee should not be liable for errors or mistakes of judgment in the execution of the trust. In an action subsequently brought by the trustor against the trustee for an accounting, the court found the trustee delinquent in his accounts in a certain sum, but found that the trustee had been guilty of no dishonest act, and the delinquency was the result of accident, error, and misadventure in the conduct of the trust business. *Held*, that there was no liability on the part of the trustee.

Appeal from District Court, Cass County; *Pollock, J.*

Action by H. D. Scott, trustee in bankruptcy for G. A. Grover, against Albert E. Jones. Judgment for plaintiff. Defendant appeals. Modified.

John E. Greene, for appellant.

Morrill & Engerud, for respondent.

BARTHOLOMEW, C. J. In 1894 G. A. Grover was doing a general merchandise business at Horace, in Cass county, N. D. On December 19, 1894, he executed a deed of trust of all his property to one Albert E. Jones, for the benefit of his creditors. The deed was executed by Grover, as trustor, and Jones, as trustee, and the creditors of Grover, as beneficiaries. This same deed was before us in *Mercantile Co. v. Grover*, 7 N. D. 460, 75 N. W. Rep. 911, 41 L. R. A. 252. Pursuant to the deed, Jones took possession of the property, and proceeded with the execution of his trust. In February, 1897, the trustor brought an action against the trustee to compel an accounting, claiming that said trustee was converting the property to his own use, and not properly accounting for the same. Grover being subsequently adjudged a bankrupt, his trustee, H. D. Scott, was substituted as plaintiff. There was an answer in full denial of this claim. The trial resulted in a judgment against Jones for \$1,000, and he appeals.

None of the testimony was brought upon the record. The trust deed was made a part of the complaint, and is before us. Appellant urges but one ground for reversal, and that is that the finding of fact does not warrant the conclusions of law. We think the point must be sustained. In the trust deed we find this provision: "The said party of the second part hereby accepts said trusts, and covenants with the said party of the first part, and with each of the parties of the third part, that he shall and will faithfully execute the several trusts hereby established: provided, however, that said party of the second part shall not be liable for errors or mistakes of judg-

ment in the execution thereof." The court finds that Jones was indebted to the estate in the sum of \$2,492.89, but that the estate was indebted to him in the sum of \$1,492.89, leaving a balance of \$1,000, for which judgment was ordered. The twenty-first finding of fact reads: "That said Jones failed to keep proper books of account of his transactions as such trustee. That he kept books of account under a system of double-entry bookkeeping, but the entries therein were so carelessly and improperly made that the books do not show a true record of his business. But the court expressly finds that, in its judgment, from the evidence, defendant, Jones, has not been guilty of any dishonest acts; any delinquency arising being the result of accident, error, and misadventure in the conduct of the business." It is clear that from the books kept by the trustee, or from evidence *aliunde*, or from both, the court was able to state to a penny the condition of the account of the trustee, because he finds the exact balance. It is certain, then, that no loss occurred to the estate by reason of careless or negligent bookkeeping. The finding quoted expressly declares that the trustee had been guilty of no dishonest acts, and that the delinquency was the result of accident, error, and misadventure in the conduct of the business. But, in our judgment, that is exactly the character of delinquency from which the trust deed relieved the trustee when it declared that he should not be held liable for errors or mistakes of judgment in the execution of the trust. Judgment on the findings should be entered dismissing the action as to the defendant Jones. It is so ordered. Reversed. All consur.

ON PETITION FOR REHEARING.

A petition for a rehearing in this case having been presented, it becomes necessary, by reason of the matters therein brought to our attention, to add to what we have already said. It is urged upon us that we have placed a wrong construction upon the findings of the trial court. We cannot so view it. The court found that Jones was short in his accounts as trustee in the sum of \$2,492.89. It also found that the value of his services as such trustee was the sum of \$1,492.89, leaving a net shortage of \$1,000, for which judgment was entered. It necessarily follows that, except as to this amount of shortage, the accounts of the trustee were correct. He had not otherwise been delinquent,—there was no other "delinquency;" and when the court, in its findings said, "Any delinquency arising being the result of accident, error, and misadventure in the conduct of the business," the language necessarily referred to this particular shortage for which judgment was rendered. There was nothing else to which it could refer. We are now informed that objection was made to the incorporation of this matter in the finding. It was argued before the trial court, and its incorporation was advisedly made. We are further informed by this application for a rehearing that counsel for respondent were well advised before the convening of this term of this court that appellant would insist upon

the construction of the findings that this court places thereon. Yet counsel rested content with the findings as they stood, and did not place respondent in any condition to obtain relief therefrom. But it is now urged that the court below did not so intend to find, and we are asked to remand the record for correction. Even if counsel have not, by laches, lost the right to urge this matter, we cannot grant it. Under Sup. Ct. Rule No. 33 (74 N. W. xii) we may remand a record when there is a defective return; that is, we may remand a record, as prescribed in the rule, to have it corrected to correspond with the record which was in fact made in the court below. Further than this our decisions have never gone. See opinion on rehearing in *Moore v. Booker*, 4 N. D. 554, 62 N. W. Rep. 607; *Coulter v. Railway Co.*, 5 N. D. 568, 67 N. W. Rep. 1046; *Baumer v. French*, 8 N. D. 325, 79 N. W. Rep. 340. These cases show that this court will not remand a record for the purpose of having any matter inserted therein that does not appear in the record of the lower court as it stood when the appeal was taken, unless proceedings that were actually had in the lower court, and by inadvertence omitted from the record. But it is conceded that the record in this court entirely corresponds with the existing record in the trial court, and that such record was advisedly made. It is obvious that the real purpose is to have this court remand the record and reinvest the jurisdiction of the District Court, to the end that such court may make new findings that will support the judgment ordered. We know of no authority or practice in this state that will permit us so to do. The petition for a rehearing is denied. But inadvertently the order heretofore made in the case was too broad. We ordered the action dismissed. That was a mistake. The decree provided for things other than the recovery of the \$1,000, and as to such other matters no appeal was taken. Our former order is vacated, and the lower court is directed to modify its decree by omitting therefrom the judgment for \$1,000, and as thus modified the decree will stand. Appellant will recover costs in this court. Modified and affirmed.

(84 N. W. Rep. 479.)

SECURITY IMPROVEMENT COMPANY, *et al* vs. CASS COUNTY.

Opinion filed November 10, 1900.

Appeal—Retrial Not Demanded in Statement.

This action is brought to quiet title to plaintiff's real estate, and plaintiff is seeking to annul certain taxes assessed against said real estate, and to cancel certain tax sales thereof. The case was tried to the court, and the trial court filed its findings of fact and conclusions of law; and pursuant thereto judgment was entered canceling some of said taxes and tax sales, and adjudging that other taxes and tax sales involved were in all respects valid and regular. Plaintiff has appealed to this court from such judgment. A statement of the case was settled in the trial court, which contained all the evidence; but such statement did not embrace a demand for a retrial in this court of the entire case, or of any fact in the case. *Held*, that this court is, under

section 5630, Rev. Codes 1899, precluded from a retrial of any fact in the case, nor can this court consider the evidence for any purpose.

No Demand for Retrial of Any Fact—Affirmance.

There was some oral evidence submitted to the trial court, but the major part of the evidence consisted of records and other matters relating to the assessment and levy of the taxes, and to the validity of the tax sales. All of the evidence not oral was stipulated to be correct by counsel, and the same is undisputed evidence. Appellant's counsel bases his contention in this court upon the evidence, and argues that upon such undisputed evidence the trial court erred in concluding, as an ultimate fact, that the taxes now involved were lawfully assessed and levied, and erred in its conclusion that the tax sale here involved was a valid sale. *Held* that, inasmuch as counsel has not demanded a retrial of the facts or of any fact in issue, this court is precluded from considering the evidence to ascertain whether the trial court did or did not err in its findings of ultimate fact.

No Specification in Statement.

Counsel has not called the attention of this court to any error appearing upon the face of the judgment roll proper. Accordingly, *held*, that the judgment, which is presumptively valid until the contrary appears, must be affirmed.

Appeal from District Court, Cass County; *Pollock, J.*

Action by the Security Improvement Company and others against Cass County. Judgment for defendant, and plaintiffs appeal. Affirmed.

J. E. Robinson, for appellants.

Morrill & Engerud, for respondent.

WALLIN, J. This action is brought to quiet the title to certain parcels of land situated in the city of Fargo. The plaintiff owns the fee, and the real purpose of the action is to cancel certain taxes or apparent taxes charged against the land in the years 1892 to 1898, inclusive, and also to vacate certain tax sales of the land, made upon such taxes. Defendant answered the complaint. The answer alleges in substance that all of said taxes and tax sales were regular and in all respects valid. The action was tried to the court and submitted for its determination, whereupon the trial court made and filed findings of fact and conclusions of law whereby it was adjudged that some of the tax levies and some of the tax sales in question were illegal and void, and that others involved were in all respects valid levies and sales; and judgment was directed to be entered pursuant to such findings, and judgment was entered accordingly. The plaintiff has appealed to this court from all parts of said judgment which are adverse to the plaintiff. Defendant has not appealed.

A statement of the case embracing all of the evidence offered at the trial was settled and allowed, and the same has been incorporated with the judgment roll and transmitted to this court. The statement omits to include any demand of a retrial in this court either of the entire case or of any specified fact in the case. The procedure which was had in the action in the court below was necessarily

governed by section 5630, Rev. Codes, 1899. But the party appealing had under said section an election, and could determine for himself whether the entire case or some fact therein should be retried in this court, or, on the other hand, whether this court should be precluded from retrying any question of fact in the case. By not demanding a retrial of any fact in this court the appellant has under the express provisions of said section, as well as under the repeated decisions of this court, deprived this court of all power or right to examine the evidence or retry any question of fact in the case. Section 5630, *supra*; *Bank v. Davis*, 8 N. D. 83, 76 N. W. Rep. 998; *Hayes v. Taylor*, 9 N. D. 92, 81 N. W. Rep. 49; *Nichols v. Stangler*, 7 N. D. 102, 72 N. W. Rep. 1089; also, case decided at this term,—*State v. McGruer*, 9 N. D. *infra*, 84 N. W. Rep. 363. And where we are precluded from a retrial of any fact the mandate of the section above cited is that all questions of fact “shall be deemed on appeal to have been properly decided by the trial court.”

Counsel for appellant has filed a brief in this court, in which he repeatedly calls attention to the evidence in the record, and attempts to point out wherein the trial court, as counsel claims, erred or was mistaken in finding the facts which that court found as ultimate facts, and included in its findings of fact. Counsel calls attention to the fact that it appears that the evidence submitted below is undisputed, and was in fact stipulated by counsel, except as to the testimony of one witness who testified for the plaintiff. Counsel now urges this court to look at the evidence, and claims that upon an examination of the evidence this court will not fail to deduce ultimate facts therefrom which will differ radically from those deduced by the trial court. But, on the other hand, counsel for the respondent has, in his brief, called the attention of the court to the same evidence, and argues in his brief that the trial court was fully justified by the evidence in making the findings of ultimate fact which were filed in the court below. Counsel asserts in his brief that there is no question of evidence in the case. It is, however, manifest that counsel for the appellant is seeking in this court to alter and reverse the findings of fact made below; and, to accomplish this object, counsel urges that the undisputed evidence—embracing a mass of stipulated evidential facts—will, upon a proper consideration thereof by this court, lead to a reversal of the findings and judgment. But in the case at bar it has been seen that this court is precluded from a trial of any of the facts embraced within the issues. Nor can this be different in a case where the evidential facts were stipulated, and, as stipulated, were presented to the trial court. It appears that despite the stipulation the trial court found the ultimate facts to be quite different from those which counsel for plaintiff would deduce from such evidential facts. It was the province and duty of the trial court to weigh and consider all the evidence, excluding that which was incompetent, and from the evidence deduce the ultimate facts upon all the issues involved. See *Gull River Lumber Co. v. School Dist. No. 39*, 1 N. D. 500, 48 N. W. Rep. 427. It must

follow from what has been said that this court is precluded not only from a retrial of any facts in issue, but from any consideration of the evidence offered in the court below and embraced in the statement. Upon this record, therefore, we are to consider the statutory judgment roll, and nothing more. Counsel for appellant is not in a position to attack the findings of fact, and our attention is not called by counsel to any conclusion of law, as embodied in the findings, which is claimed to be unwarranted by the facts as found and filed in the District Court. Every legal presumption is in favor of the regularity and validity of the judgment entered in the court below, and hence we shall be compelled to direct an affirmance of the judgment. All the judges concurring.

ON PETITION FOR REHEARING.

In this action counsel for the appellant has filed a petition in this court which embraces a variety of features. Counsel asks—First, that this court shall grant a reargument of the case in this court; and, secondly, if the reargument is denied, that this court will remand the record to the District Court, to enable counsel to apply to that court for leave to incorporate a new feature in the statement of the case; thirdly, if the last-mentioned request is denied, counsel asks that the appeal be dismissed without prejudice to another appeal; and, finally, counsel asks, if each and all of his said requests are denied, that counsel may be permitted to amend, under section 5625, Rev. Codes, to cure the radical defect now existing in the statement of the case. Counsel contends with his accustomed vigor and earnestness that he should be permitted to reargue the case for the reason that the point upon which this court has decided the case was not suggested on the argument either by counsel or by any member of the court, and this ground is true in point of fact. But it appears in the original opinion that this court affirmed the judgment of the court below solely upon the ground that this court, upon this record, was not only without lawful authority to consider and determine the facts anew, but was further, under section 5630, Rev. Codes, commanded in such a case to rule that the facts as found and decided by the court below were “properly decided.” It therefore appears that in the case at bar the court was, under the express terms of an unambiguous statute, forbidden to sit as a trial court to hear the evidence and determine the facts. This being the law of the state, this court is bound by it; nor can authority to try any case on the evidence *de novo* be conferred, either by amicable arrangements between counsel, or otherwise than as the law directs. Upon this point, see *Montgomery v. Harker* (decided at this term), 84 N. W. Rep. 369; also, *Thuct v. Strong*, 7 N. D. 545, 75 N. W. Rep. 922, and cases cited in the original opinion in this case. It is true, this court did not at the argument call attention of counsel to the omission in the statement of any demand for a retrial of the facts. This omission cannot operate, however, to confer lawful

authority to try a case anew when the state of the record would render a retrial unlawful. The court, had it known of the omission, would most certainly have put a stop to the argument, and this for the reasons already stated. The point is one which cannot be waived by either court or counsel. The petition admits that the statement does not in express terms contain a request either for a retrial of the entire case or of any specified fact in the case, but counsel strenuously urges that a request for a retrial is substantially made in the statement. If this claim was supported by the facts, the petition to reargue the case would, of course, be granted. But repeated examination of the statement as made by each member of this court only serves to strengthen our unanimous conviction that no such demand is in any manner made in the statement. Counsel calls attention to a paper found in the statement which is headed "Assignment of Errors," and insists that the contents of this paper should be construed as a request for a retrial upon the evidence of the points enumerated in the paper, which are four in number. Upon this point we remark, first, that an assignment of errors occurring at the trial, or a specification of particulars wherein the evidence fails to justify the findings of fact, is alike inappropriate and confusing in a case tried under section 5630, which is brought to this court for a retrial of the facts. In such cases this court, under an innovation in the practice made by that statute, does not sit as a court of review to correct errors in ruling or findings of fact made by the trial court. On the contrary, we sit in such cases as a trial court, to consider the evidence, and determine the facts anew; and in this class of cases counsel should therefore embody their points in their briefs, and to call the attention of this court to erroneous rulings made below by assigning a list of errors in the statement is worse than useless. See *State v. McGruer* (decided at this term), 84 N. W. Rep. 363. But the assignment of errors embraces no request to retry any question of fact. The first and second errors assigned are as follows: "(1) In the year 1893 the assessment was void because that said tracts were assessed as one tract, and not as two tracts. Each tract should have been assessed separately. (2) In the years 1893, 1894, and 1895 the assessment was void, because that in said years the records of the county commissioners failed to show that they held any session as a board of equalization." It is manifest that the first error alleged consists in the erroneous ruling of the trial court in holding as a legal conclusion on the undisputed facts that the assessment was legal and valid. The second is like the first. The error complained of is that the trial court held that the equalization was legal and valid upon the facts stated, none of which are disputed. These assignments are illustrative of the other two assignments of error. It is therefore patent by the assignments themselves that counsel has pointed out to this court certain conclusions of law made by the trial court which were based upon the evidence submitted to the trial court. These conclusions of law are characterized as erroneous. But the question now is whether

this court has been lawfully requested to try anew any question of fact in the case. To this question we are compelled to give a negative answer. Upon this branch of the petition we will only reiterate what was said in the opinion,—that counsel has assigned no error in this court predicated upon the findings actually made and filed by the District Court in this case, and hence we shall give the judgment of the District Court the benefit of the prima facie assumption that the same is in all respects valid. Nor can this appeal be dismissed upon a mere *ex parte* application therefor, made after the case has been submitted and decided, and after a petition for a reargument has been denied. The application obviously comes too late.

The remaining requests of the petition must also be denied. The case next cited below is squarely on all fours with the case at bar. See *Ricks v. Bergsvendsen*, 8 N. D. 578, 80 N. W. Rep. 768. In the opinion in that case this court said: "The case was tried under chapter 5 of the Laws of 1897, and is governed by its provisions, which are unambiguous and simple in their requirements. The mandate of the statute is explicit and inexorable. The statement itself must contain the specifications as above indicated, and this court so held in *Bank v. Davis*, 8 N. D. 83, 76 N. W. Rep. 998. Nor does the statute admit of a construction to the effect that the required specifications can be incorporated either in a notice of appeal or in a judge's certificate, as was attempted here. Such is not the language of the statute. A simple observance of the provisions of the statute of 1897 in making up the record sent to this court would have insured a retrial of the action in this court upon the merits; but, upon the record as it exists, no review of the case upon the evidence can be had without a violation of the existing law, permitting this court to sit as a trial court in certain cases only. The exceptions filed below were wholly superfluous, and could not be considered in this court, even if the whole case could be reviewed. See *Bank v. Davis*, supra." In the *Ricks* Case, as in this, counsel, in a petition for a rehearing, urged this court to grant an opportunity for amending the statement under the provisions of section 5625, Rev. Codes. In denying such request this court used language which is directly applicable to the facts here. We said: "Counsel cites section 5625 of the Revised Codes, and claims that under said section it is the duty of this court to transmit the record, with a view to the perfection of the appeal, and to make the same effectual. But counsel in this case is not seeking to perfect the appeal or to make it effectual. The validity of the appeal is not at all involved in any object which counsel is seeking to attain. The citation is therefore not in point. The petition for a rehearing and the said request of counsel are denied. The other judges concurring." The petition is in all respects denied. All the judges concurring.

(84 N. W. Rep. 477.)

C. TRONSON vs. COLBY UNIVERSITY.

Opinion filed November 9, 1900.

Mortgage—Cancellation—Consideration.

A. executed and delivered to B. his non-negotiable promissory note, and secured the same by mortgage upon realty. B., in consideration thereof, agreed to have certain claims against A., which were held by third parties, and which were liens upon such realty, satisfied of record, no time for performance being fixed. B. sold the note and assigned the mortgage to C., but failed to have the prior liens satisfied in whole or in part. A. brings an action against C to have the note and mortgage canceled. *Held*, that the action could not be maintained.

Mutual Promises But Independent.

The promise to pay made by A., and the promise to procure satisfaction made by B., furnished each the consideration for the other; but they were independent promises, the breach of either furnishing an undisputed cause of action to the other party, and they could not become dependent by lapse of time.

Appeal from District Court, Traill County; *Pollock, J.*

Action by C. Tronson against the president and trustees of Colby University. Judgment for plaintiff. Defendant appeals.

Reversed.

Tracy R. Bangs, for appellant.

The note in suit is drawn with a stipulation for the payment of current rate of exchange in New York City in gold, or its equivalent, its negotiability is thereby destroyed. *Flagg v. School District*, 4 N. D. 30. In every other respect it is a perfect and valid promissory note. *Hastings v. Thompson*, 54 Minn. 182, 55 N. W. Rep. 968, 21 L. R. A. 178; *Whittle v. Bank*, 26 S. W. Rep. 1106. The note was given to McLaughlin in consideration of the \$170 in money and the latter's agreement to use the balance of the loan in paying off and securing the discharge of certain indebtedness due from Tronson to third parties. In this transaction there was a good, valuable and sufficient consideration for the \$1,000 note. Consideration in bills and notes is some right, interest, profit or benefit accruing to the one party, or some forbearance, loss, or in other words, detriment suffered by the other. *Bigelow on Bills & Notes*, 213; *Currie v. Nind*, Law Rep. 10 Exch. 162. It is always sufficient to hold the note if the maker thereof got what he contracted for whether that consideration be commensurate to the amount of money stated in the note, as measured by the ordinary theories of value, being entirely immaterial. *Wolford v. Powers*, 85 Ind. 294, 44 Am. Rep. 16; *Earl v. Peck*, 64 N. Y. 596; *Amherst Academy v. Cowels*, 23 Mass. 427, 17 Am. Dec. 387. The true consideration for the note and mortgage now in controversy was the money in hand paid by McLaughlin to Tronson, and McLaughlin's contract to become respondent's agent and pay off certain of respondent's debts. This

was sufficient consideration to support the note and mortgage. *Chapman v. Eddy*, 13 Vt. 205; *Earle v. Angell*, 32 N. E. Rep. 164; *Trask v. Vinson*, 20 Pick. 105; *Hubon v. Park*, 116 Mass. 541; *Turner v. Rogers*, 121 Mass. 12; *Hodgkins v. Moulton*, 100 Mass. 309; *Gutlon v. Marcus*, 43 N. E. Rep. 125; *Wells v. Sutton*, 85 Ind. 70; *Thompson v. Thompson*, 43 Ky. 502; *Lindell v. Rokes*, 60 Mo. 249, 21 Am. Rep. 395; *Hamer v. Sidway*, 21 Am. St. Rep. 693; *Wright v. Wright*, 54 N. Y. 437; *Gould v. Banks*, 24 Am. Dec. 90; *Overton v. Curd*, 8 Mo. 420; *Babcock v. Wilson*, 25 Am. Dec. 263; *Davis v. Calloway*, 95 Am. Dec. 671; *Howe v. O'Mally*, 3 Am. Dec. 693; *Sharon v. Sharon*, 8 Pac. Rep. 614; *VanEpps v. Redfield*, 68 Conn. 39, 34 L. R. A. 360; *Provenshee v. Piper*, 36 Atl. Rep. 552; *Pullman v. Booth*, 28 S. W. Rep. 719; *Gum Co. v. Braendly*, 51 N. Y. Supp. 93; *Daniels on Neg. Inst.* § 187; *Randolph, Com. Paper*, § § 479-481. Respondent is not entitled to the relief prayed for, viz: the cancellation of the note and mortgage, because he has shown no mistake; he got all he contracted for. He has shown no fraud or accident. The note is non-negotiable, was past due when respondent commenced this action. No ground for the exercise of equity jurisdiction for the cancellation of a written instrument is alleged or proven. *Lewis v. Tobias*, 10 Cal. 575; *Field v. Holbrook*, 14 How. Prac. 108; *Hamilton v. Cummings*, 1 Johns. Chan. 517; *Pom. Eq. Jur.* § 1377. There must be a controlling reason for coming into equity. *Boyd v. Boyd*, 33 N. E. Rep. 568. Relief is never given as against an innocent purchaser. *Pom. Eq. Jur.* § § 776, 871 and 918. Tronson made his note and mortgage to McLaughlin for a good and complete consideration. He thus put it in McLaughlin's power to transfer the securities. The instruments were valid in their inception and valid when taken by the Colby University. They are still valid and cannot be delivered up and cancelled without working an injustice to the present holder. 18 Enc. Pl. & Prac. 750, note 2; *Brown v. Boyd*, 158 Mass. 470, 33 N. E. Rep. 568; *Dixon v. Wilmington Trust Co.*, 20 S. E. Rep. 464; *Mayes v. Robinson*, 5 S. W. Rep. 611. There was no time specified for the performance of the promise of McLaughlin to secure releases of the prior incumbrances. Plaintiff must therefore allege and prove a demand and refusal to perform, or that McLaughlin is insolvent and unable to perform. *Worley v. Mourning*, 4 Ky. 254; *Hamble v. Tower*, 14 Ia. 530; *Morey v. Enke*, 5 Minn. 392; *Adkins v. Farrell*, 42 S. W. Rep. 1145; *Mount Joy v. Mullikin*, 16 Ind. 226; *Gray v. Greene*, 9 Hun. 334; *Parker v. Parker*, 9 South. Rep. 426; *Tom v. Wollhoefer*, 61 Tex. 277; *Charpoux v. Bellocq*, 31 La. Ann. 164; *Duggar v. Dempsey*, 43 Pac. Rep. 357; *Axtel v. Chase*, 77 Ind. 74; *Maness v. Henry*, 11 South. Rep. 410

J. A. Sorley, for respondent.

Tronson executed to McLaughlin his note secured by mortgage, in consideration whereof McLaughlin agreed to take up and satisfy

of record a mortgage amounting to \$616, and judgments amounting to \$201, which he failed to do. Was the agreement dependent or independent? It will be construed as dependent unless a contrary intention appears from the terms of the contract itself. *Davis v. Jefferies*, 58 N. W. Rep. 815; *Lester v. Jewett*, 11 N. Y. 453; *Kane v. Hood*, 13 Pick. 281; *Swan v. Drury*, 22 Pick. 485; *Williams v. Healey*, 3 Denio, 363; *Grant v. Johnson*, 5 N. Y. 247; *Parker v. Parmele*, 20 Johnson, 130; *Galvin v. Prentice*, 45 N. Y. 162; *Dunham v. Pettee*, 8 N. Y. 508; *Smith v. Lewis*, 26 Conn. 110; *Clark v. Weis*, 87 Ill. 438; *Wagon Co. v. Crocker*, 4 Fed. Rep. 578; *Perry v. Connell*, 31 S. W. Rep. 685. If the note in question had been made payable at a time so soon after its execution that McLaughlin could not with reasonable diligence have secured satisfaction of mortgage and judgments, then a recovery could be had in an action commenced when the note fell due without showing a compliance with his part of the agreement, but if he delayed bringing the suit until a time when satisfactions should have been secured then a compliance with his agreement must be shown before a recovery can be had. *First Nat. Bank of Madison v. Spear*, 80 N. W. Rep. 166; *Bank v. Hagner*, 1 Peters, 455; *Loud v. Water Co.*, 153 U. S. 564; *Hogan v. Kyle*, 35 Pac. Rep. 399; *Divine v. Divine*, 58 Barb. 264; *Underwood v. Tew*, 34 Pac. Rep. 1100; *Shelly v. Mikkelson*, 63 N. W. Rep. 210, 5 N. D. 22. The validity of the defense of want of consideration was passed on in *Flagg v. School District*, 5 N. D. 191; *Towle v. Greenberg*, 6 N. D. 37, 68 N. W. Rep. 82. A partial failure of consideration is a good defense *pro tanto*. 4 Am. & Eng. Enc. L. (2d Ed.) 195. The facts set out in the complaint are sufficient to invoke the aid of a court of equity. 3 Pom. Eq. Jur. 1188, 1233; 1 Pom. Eq. Jur. 166, 170 and 171; *Heywood v. City of Buffalo*, 14 N. Y. 534; *Ward v. Dewey*, 16 N. Y. 519; *Byne v. Vivian*, 5 Ves. 604; *Crooke v. Andrews*, 40 N. Y. 547; *Marsh v. City*, 59 N. Y. 280; *Lewis v. Tobias*, 10 Cal. 575; *Field v. Holbrook*, 14 How. Prac. 108; *Pierce v. Webb*, 3 Barb. Ch. 16; *Jackman v. Mitchell*, 13 Ves. 581; *Hayward v. Dimsdale*, 17 Ves. 111; *Petit v. Shepherd*, 5 Paige, 498; 2 Story's Eq. Jur. 700; *Ryerson v. Willis*, 81 N. Y. 277; *Fitzmaurice v. Mosier*, 16 N. E. Rep. 175; *Otis v. Gregory*, 13 N. E. Rep. 39. A party to an instrument which is of no legal force or validity whatever may ask the aid of a court of equity in procuring its surrender and cancellation. *Bishop v. Moorman*, 98 Ind. 1; *Scobey v. Walker*, 15 N. E. Rep. 674; *Brown v. Kranse*, 23 N. E. Rep. 1012; *Honnan v. Hartmentz*, 27 N. E. Rep. 731. A court of equity will freely rescind a conveyance by parents to a son in consideration of his covenant to support them, in case of a breach of such covenant. *Morgan v. Loomis*, 48 N. W. Rep. 109; *Blum v. Bush*, 49 N. W. Rep. 142; *Lampery v. Lampery*, 12 N. W. Rep. 514; *Mansfield v. Mansfield*, 52 N. W. Rep. 290; *Barker v. Smith*, 52 N. W. Rep. 723.

Such a court of equity will lend its aid to cancel a mortgage that is claimed to have been paid. *Donaldson v. Wilson*, 44 N. W. Rep. 429; *Ingals v. Bond*, 33 N. W. Rep. 404; *Shilling v. Darmody*, 52 S. W. Rep. 291; *Rogers v. Day*, 74 N. W. Rep. 190. By going to trial without raising the point, either by demurrer or answer, appellant cannot now for the first time be held to question respondent's right to the relief prayed. *Black v. Miller*, 50 N. E. Rep. 1009; *Stout v. Cook*, 41 Ill. 447; *Ryan v. Duncan*, 88 Ill. 144. An objection to the jurisdiction of the court that there is a perfect remedy at law cannot be made for the first time at the hearing, it should be taken by demurrer to the bill or by answer. 1 Enc. Pl. & Prac. 883; *Clay v. Greenwood*, 53 N. W. Rep. 659; *Corey v. Sherman*, 60 N. W. Rep. 232; *Buck v. Young*, 27 N. E. Rep. 1006; *Mayes v. Goldsmith*, 58 Ind. 94; *Day v. Henry*, 4 N. E. Rep. 44; *Lauder v. Green*, 46 N. W. Rep. 1108; *Benjamin v. Vieth*, 45 N. W. Rep. 731; *Gould v. Hurto*, 15 N. W. Rep. 588; *First Nat. Bank v. Rozeley*, 61 N. W. Rep. 195; *Bright v. Ecker*, 68 N. W. Rep. 326; *McVey v. Marratt*, 45 N. W. Rep. 548; *Dodge v. Davis*, 52 N. W. Rep. 2; § 5272, Rev. Codes; *Kolka v. Jones*, 71 N. W. Rep. 558.

BARTHOLOMEW, C. J. This is an action in equity to cancel a certain note for \$1,000 held by defendant against plaintiff, and to cancel and satisfy of record a mortgage upon real estate given to secure said note. Plaintiff was successful below. There is but one question in the case, and that is a question of law. The undisputed facts show that in January, 1889, the plaintiff borrowed from one S. W. McLaughlin the sum of \$600, and gave McLaughlin his promissory note for said sum, due December 1, 1893, and bearing interest at the rate of 8 per cent. per annum before maturity, and 12 per cent. after maturity. To secure this note plaintiff executed and delivered to McLaughlin a mortgage upon certain land in Traill county, which was recorded January 24, 1889. Prior to March 30, 1893, judgments in favor of four different parties had been docketed against plaintiff in Traill county. These judgments amounted to about \$1,200. A few days after the note and mortgage above mentioned were given, McLaughlin sold the note and assigned the mortgage to one Brooks, and the assignment was recorded February 1, 1889. On March 30, 1893, and prior to the maturity of the note for \$600, plaintiff made another loan from said McLaughlin for the sum of \$1,000, for which amount he executed his note to said McLaughlin, secured by mortgage upon the same land. At the time this note was executed it was non-negotiable, by reason of the fact that it contained a provision for current exchange on New York. *Flagg v. School District*, 4 N. D. 30, 58 N. W. Rep. 499, 25 L. R. A. 363. A few days after their execution the note was sold and mortgage assigned by McLaughlin to defendant, who now holds and owns the same. It is clear, under the evidence, that at the time of the execution and delivery of this note and mortgage the plaintiff received no money from McLaughlin. He made this loan for the

purpose of taking up the existing liens upon his land, to-wit: the mortgage for \$600 and the judgments already mentioned; and McLaughlin promised to get the mortgage and the judgments satisfied upon the records in Traill county, and send proofs of such satisfactions to plaintiff, and to send plaintiff any balance from the \$1,000 loan that should be coming to him. Subsequently he sent plaintiff a check for \$176.60, but he never paid the outstanding mortgage of \$600 or the judgments, or any portion of either. Plaintiff, having paid interest upon the last loan in excess of the amount of cash received thereon, now seeks to cancel the note and mortgage by reason of the facts stated. It is evident that whether he can succeed or not depends upon whether or not his promise to pay was dependent upon the fulfillment of McLaughlin's promise to procure release of the prior mortgage and judgments. If the promise was thus dependent, then the consideration for the note has to that extent failed, and plaintiff's equity is inherent in the note, and in McLaughlin's hands the note would represent no indebtedness, and, the note not being negotiable, defendant would stand in no better position. But, on the other hand, if plaintiff delivered his promise to pay, relying upon McLaughlin's promise to secure the releases,—in other words, if McLaughlin's promise was the consideration for the promise to pay,—then there was a full consideration for the promise to pay, and no equity in plaintiff's favor inheres in the note. He may have his cause of action for damages against McLaughlin for breach of contract, but he cannot avoid his liability upon the note. The industry of counsel for the respondent has enabled him to cite many cases where the question of dependence or independence of promises was discussed. But the cases cited do not aid us to any extent. He cites *Lester v. Jewett*, 11 N. Y. 453,—a leading case, and one that cites many authorities. In that case the defendant agreed in writing to purchase certain shares of stock at a future day certain, and at a stated price. The vendor sought, after the date for performance, to recover the purchase price. The court held that to entitle him to recover he must aver and prove a tender of the stock, as the promises were dependent. This principle is always enforced in contracts of sale unless there are special circumstances. The law presumes the promises to be dependent unless the contrary clearly appears. The vendor cannot recover the purchase price unless he tenders the goods and demands payment. The vendee cannot recover damages unless he tenders payment and demands the goods. Respondent cites and quotes from the late case of *Davis v. Jeffris* (S. D.) 58 N. W. Rep. 815. There two parties entered into a contract by which, for a price to be paid by one, the other agreed to construct a building equipped with certain patent machinery, to be used in carrying on the business for which the building was designed; the builder agreeing to procure a deed from the patentee conveying the right to use the machinery in such building. The builder sued to recover the contract price, without furn-

ishing the grant from the patentee. The court held that he could not recover; that the grant was a thing of value, without which the machinery might prove of no value to the other party; and that the promise to procure the grant and the promise to pay were dependent. We note these facts only to show the manifest distinctions between those cases and the case at bar. Respondent also relies upon *Perry v. Connell* (Tex. Civ. App.) 31 S. W. Rep. 685, and that case is more nearly in point. There the defendant gave his note to plaintiff in consideration of the delivery to him of a note that he had previously given to a third person, and which plaintiff represented was in his possession and belonged to him. The note was never delivered up. The court denied a recovery by plaintiff. As the case is reported, we cannot see that the principle involved is different from what it would have been had the note been given in consideration of a loan of money then to be made, and the payee had taken the note, but declined to pay over the money. In other words, it was a promise to do a certain act in presenti,—something that should be consummated then and there; and in the contemplation of the parties it was the completed act, and not the promise, that furnished the consideration for the note.

In the case at bar it was well known and understood that the promise made by McLaughlin could not then be consummated, nor was any definite time fixed for its consummation. The note and mortgage were executed and delivered in Grand Forks county. The releases were to be made upon the records of Traill county. The note secured by the old mortgage would not be due until eight months after the execution of the second mortgage. McLaughlin did not own it or pretend to own it. An assignment by him of the old mortgage had been on record for four years. There is nothing to indicate that the holder of the note would accept payment before maturity. The judgments must be satisfied. McLaughlin could not satisfy anything. His promise was, primarily, to procure others to act. It was only the acts of third parties that could benefit plaintiff. For these reasons it is apparent that the parties did not understand that the promise to pay and the promises to procure the releases of the liens were dependent promises. This may appear in a stronger light if we change parties defendant and the cause of action. Let us suppose that, after waiting a reasonable time for McLaughlin to procure the releases, plaintiff had paid the prior liens, and then brought action against McLaughlin to recover damages for the breach of his agreement to procure such releases: would it be contended that McLaughlin could defeat the action by alleging that plaintiff had not paid his note of \$1,000, and that the performance of the promise to procure the releases was dependent upon the performance of plaintiff's promise to pay? And yet, if those promises were dependent, they were mutually dependent. We conclude, then, that the promise to procure the releases, and not the fulfillment of that promise, constituted the consideration of the note.

See, upon this point, *Chapman v. Eddy*, 13 Vt. 205; *Trask v. Vinson*, 20 Pick. 105; *Earle v. Angell*, 157 Mass. 294, 32 N. E. Rep. 164; *Hubon v. Park*, 116 Mass. 541; *Hodgkins v. Moulton*, 100 Mass. 309; *Turner v. Rogers*, 121 Mass. 12. But, conceding that the promises were independent when made, respondent insists that they had become dependent when this action was commenced. He cites the familiar instances where a party contracts for the sale of real estate, and takes notes for the purchase price, maturing at different times, and contracting to execute to the payee a deed of the land upon full payment. Of course each note except the last may be sued upon as it matures, without reference to the execution of the deed. No action can be maintained upon the note last maturing without a tender of the deed. As to that note the promises were dependent from the first. If the grantor permits all the notes to run until the maturity of the last, and then brings suit upon all, he can recover nothing without tendering a deed. This is familiar law. See *Shelly v. Mikkelson*, 5 N. D. 22, 63 N. W. Rep. 210, and cases cited. By electing to permit all payments to run until the last becomes due, the grantor treats all as becoming due at that time; but performance upon his part is then due, and by his own act he has made the entire payment dependent upon his performance. Respondent insists that, as the time for performance upon McLaughlin's part has elapsed, no recovery could be had upon the note without pleading performance upon McLaughlin's part. We think this is fallacious, and that the principle invoked cannot be applied to this case. No portion of plaintiff's promise to pay was ever made, by contract, dependent upon performance by McLaughlin. No time was ever fixed for performance by McLaughlin. No demand for performance was ever made upon him, so far as the record shows. He may yet perform, for aught that appears. If he fail, plaintiff has his independent right of action against him for damages. Suppose, to repeat an illustration, that plaintiff were asserting that right of action against McLaughlin now; could McLaughlin defend by alleging plaintiff's failure to pay the note for \$1,000? Clearly not. Performance by McLaughlin could not be made to depend upon such payment. And if payment were overdue it could make no difference. These propositions need no support. Plaintiff cannot recover upon this record. Had plaintiff been forced to pay those prior liens, or had he voluntarily paid them, a different case might be presented. Upon that we express no opinion. The record clearly shows that nothing has been paid upon those claims. In the judgment of this court, the action should be dismissed. The District Court is directed to set aside its judgment entered herein, and enter judgment dismissing the action. Reversed. All concur.

(84 N. W. Rep. 474.)

STATE EX REL P. J. MCCLORY vs. N. MCGRUER.

Opinion filed November 7, 1900.

Liquor Nuisance—Injunction.

This is an action brought under section 7605, Rev. Codes 1895, to abate a liquor nuisance, and enjoin its further maintenance. The complaint broadly charged, in effect, that the defendant, who was a licensed pharmacist, holding a druggist's permit, had established and was maintaining in his drug store a liquor nuisance by selling and keeping for sale intoxicating liquors as a beverage. When the evidence was closed, the trial court, upon the request of plaintiff's counsel, made and filed findings of fact whereby it conclusively appears that the defendant had in fact established in his drug store, and was there maintaining, a liquor nuisance, as defined in said section, and was there selling and keeping for sale intoxicating liquor as a beverage, and had frequently sold such liquors as a beverage to minors, habitual drunkards, and others. Upon such findings the District Court filed its conclusions of law adjudging that the court had not jurisdiction of the subject-matter of the action, and that the action could not be maintained, under said section, as against a druggist holding a regularly issued permit; and pursuant to such findings a judgment was entered in the District Court dismissing the action with costs. *Held*, that said conclusions of law are not warranted by the facts found, and are entirely erroneous; and *held*, further, that the judgment entered herein is erroneous, and must be reversed, and a new judgment entered for the relief demanded in the complaint.

Exceptions to Findings Not Reviewable on Appeal from Judgment.

Both parties have appealed to this court from said judgment, and the defendant states in his notice of appeal that he is desirous of attacking said findings of fact in this court. A statement of the case was settled, which embodies certain exceptions to the findings of fact; also certain specifications whereby the defendant alleges that such findings are unsupported by the evidence, and are, moreover, illegal, because the same are based upon incompetent testimony, to which defendant objected at the trial. The statement further embraces a list of alleged errors of law based upon rulings made upon the admission of the evidence, but said statement does not contain any of the evidence offered at the trial. *Held*, construing section 5630, Rev. Codes 1899, that each and all of said enumerated papers contained in said statement of the case are wholly unauthorized by any law or rule of practice, and that none of the same have any efficacy whatever in any case in which the procedure is governed by said section of the Code.

Stated Case Must Demand Retrial.

Held, further, that where, as in this case, there is no demand embodied in the statement of the case, either for a retrial in this court of the entire case or of any specified fact therein, this court is wholly without power to retry any issue of fact in the case. *Held*, further, that in such cases this court will not sit to review alleged errors of law arising on rulings made upon the elicitation of the evidence in the court below. See *Bank v. Davis*, 8 N. D. 83, 76 N. W. Rep. 998; *Hayes v. Taylor*, 9 N. D. 92, 81 N. W. Rep. 49; and *Nichols Shepard Co. v. Stangler*, 7 N. D. 102, 72 N. W. Rep. 1089.

Appeal from District Court, Cavalier County; *Fisk*, J.

Action by the state, on the relation of P. J. McClory, assistant attorney general, against N. McGruer, to abate a liquor nuisance. From the judgment both parties appeal.

Reversed. Judgment ordered for plaintiff.

Bosard & Bosard, for appellant.

Templeton & Rex, and *F. W. McLean*, for respondent.

WALLIN, J. This action was instituted by P. J. McClory, as assistant attorney general, under section 7605 of the Revised Codes of 1895, to abate an alleged nuisance created by selling and keeping for sale intoxicating liquors as a beverage. The action was tried to the court without a jury, and after the evidence was submitted counsel for plaintiff framed and presented to the trial court findings of fact,—18 in number,—and requested said court to make and file such findings, and further requested the court to make and file certain conclusions of law in plaintiff's favor, and to direct the entry of a judgment for the relief demanded in the complaint. Pursuant to such request, the trial court made and filed each and all of plaintiff's said findings of fact, but refused to find the conclusions of law as requested by plaintiff's counsel; whereupon the trial court made other conclusions of law favorable to the defendant, and thereby adjudged that under the facts so found the trial court did not have jurisdiction over the subject-matter of the action, and the court further directed that the action be dismissed, with costs against the plaintiff. Pursuant to such findings, judgment was entered dismissing the action, with costs. From such judgment the plaintiff appealed to this court, and subsequent to the plaintiff's appeal the defendant also perfected an appeal to this court from said judgment. The notice of appeal served by defendant embraced the following language: "By this appeal the defendant seeks to review only the findings made by the court in behalf of plaintiff at plaintiff's request." A statement of the case was settled in the District Court, and the same is incorporated in the record sent to this court. The statement of the case embraces certain papers, the material features of which may be summarized as follows: (1) A paper showing that defendant, at the opening of the trial, objected to the introduction of any evidence under the complaint, for the reason that the complaint did not state a cause of action, in this: (a) That an injunctive proceeding will not lie against a druggist holding a permit under the laws of this state; (b) upon the ground that the court has not jurisdiction of the subject-matter; (c) upon the ground that the complaint does not charge violations of the law with sufficient certainty. (2) At the trial the defendant further objected to the introduction of any evidence of sales of liquors to any person whomsoever except to one Ed Gleason, for the reason that sales to no other persons were charged in the complaint. (3) The introduction of evidence of sales to minors and habitual drunkards was objected to upon the ground that sales to such persons were not

alleged. (4) Objections were made to the introduction of evidence upon various other grounds, but these need not be particularly set out, as the same are wholly immaterial for reasons which will be hereafter stated. (5) The statement of the case further embodied exceptions to 12 of the said findings of fact made at the plaintiff's request. All of said exceptions are made upon the ground that there is no competent evidence tending to support the same; all of said evidence having been objected to by the defendant. (6) The statement embraces, also, specifications of particulars in which the defendant seeks to point out wherein said 12 findings of fact are not justified by the evidence, and this on the ground that the evidence was incompetent, and was received against the defendant's objections thereto. (7) The statement further contains a list setting out 12 "specifications of errors of law." These specifications are aimed also at the court's findings of fact, including findings numbered from the fifth to the sixteenth, inclusive. These alleged errors of law are placed upon the ground that such facts, respectively, were erroneously found, for the reason that the evidence offered to sustain the same was incompetent, and was received against objection made by the defendant.

The complaint is as follows: "(1) That at the city of Langdon, in the county of Cavalier, and state of North Dakota, the defendant herein, in a building situated on lot six (6) of block twenty-seven (27) of the original townsite of Langdon, now keeps and maintains a bar and place for the sale of intoxicating liquor as a beverage; that at said place the said defendant has maintained, ever since the 1st day of January, 1896, a public bar, equipped with glasses, bottles, and has during all of said time and he does now keep therein beer, wine, whisky, brandy, and divers and sundry other fermented, malt, and vinous liquors,—all of which said liquors are intoxicating; and the defendant keeps the same in said building for the purpose and with the intent of selling the same to be used and drank as a beverage, and for the purpose of selling the same in violation of law. (2) That the defendant has sold intoxicating liquors at said place to divers and sundry persons, and particularly as follows: Alcohol to Ed Gleason on July 7, 1898; and is now engaged in selling such liquors continuously and as a common practice and business, and will continue so to do, as plaintiff is informed and verily believes, unless restrained by the proper order of this court. (3) That said defendant, N. McGruer, has permitted said intoxicating liquors to be used and drank upon the said premises, and over his said bar, and now allows the same to be used and drank over said bar; and he, the said defendant, knowingly permits persons to resort to said place for the purpose of drinking intoxicating liquors as a beverage. (4) That the defendant, N. McGruer, is now, and at all the times hereinafter and hereinbefore mentioned has been, the owner in fee of the building situated on lot six (6) of block twenty-seven (27) of the original townsite of the city of Langdon, in Cavalier

county, state of North Dakota, wherein the saloon operated by the said N. McGruer is kept as aforesaid. (5) That a permit has been issued to said defendant, N. McGruer, by the county judge of said Cavalier county of Cavalier, N. D., but that said liquor was sold in violation of said permit. (6) That the said N. McGruer will continue to occupy said place, and to keep and use the same as a place for the sale of intoxicating liquors, as aforesaid, and a common saloon, indefinitely in the future unless restrained by the injunction and decree of this court." The relief demanded in the prayer of the complaint was that such nuisance should be abated, and the defendant enjoined from further maintaining the same, for general relief, and for costs. The answer to the complaint consisted of denials of all the material features of the complaint.

This action having been tried in March, 1899, by the court without a jury, is, as to its procedure in the court below and in this court, governed by the provisions of section 5630 of the Revised Codes of 1899; and with reference to the matter of procedure an important preliminary question is presented. The record does not embrace the evidence presented to the court below, or any part thereof; nor does the statement of the case embrace a demand by either of the appellants of a trial anew in this court either of the entire case or of any specified question of fact in the case. In view of these omissions, the language of said section 5630 is directly applicable to this case. The section declares, with reference to a statement of the case, that the appellant "shall specify therein the questions of fact that he desires the Supreme Court to review, and all questions of fact not so specified shall be deemed on appeal to have been properly decided by the trial court." It is further declared that the Supreme Court "shall try anew the questions of fact specified in the statement, or in the entire case." Under the language of said section it is clear that upon this record this court is without power either to try anew the entire case, or any particular question of fact in the case. The statute is further explicit to the point that, in the absence of specifications, and of any demand of a retrial in this court, this court is compelled to hold that all questions of fact decided below were properly decided. Upon this point see *Bank v. Davis*, 8 N. D. 83, 76 N. W. Rep. 998. In the case cited this court used the following language: "Under the amendment we are considering such specifications as are required by former statutes and by the rules of this court are no longer required in actions tried below without a jury, and which come to this court for a retrial upon the merits." See 8 N. D. 86, 76 N. W. Rep. 1000. In the case at bar no question of fact presented in the record can be retried, and it is, therefore, clear in this case that the list of alleged errors of law contained in the statement and based upon the rulings made upon the admission of the evidence are not pertinent, nor does the same subserve any useful purpose; and this is true likewise of the list of specifications above mentioned, in which it is sought

due was decided not to be a 'dealing' in notes. Of course, all such transactions must be compromises in good faith, and not mere cloaks or devices to cover unauthorized practices." In *Holmes & Griggs Mfg. Co. v. Holmes & Wessell Metal Co.*, 127 N. Y. 252, 27 N. E. Rep. 831, it is said: "It is doubtless true that a corporation cannot purchase or deal in stocks of another corporation unless expressly authorized by law so to do;" citing cases. "It is equally true, however, that it may do whatever may be necessary in the exercise of its corporate franchise. The selling of property and the collection of debts are among the powers given; and hence it may take title to all kinds of property, even the stock of another company, in payment of a debt." In *People v. Chicago Gas Trust Co.*, 130 Ill. 268, 22 N. E. Rep. 798, the court condemns the purchase by one gas company of the stock of another gas company, and places the ruling upon the specific ground that such purchase was not directly appropriate to the execution of the specific power granted. But the court in terms concedes the right of the purchasing company to receive such stock in payment of a debt. See, further, *Ditch Co. v. Zellerbach*, 37 Cal. 543; *Howe v. Carpet Co.*, 82 Mass. 493; *Ellerman v. Stock-Yards Co.*, 49 N. J. Eq. 217, 23 Atl. Rep. 287; Thomp. Corp. § 5719; Mor. Priv. Corp. §§ 648, 649, 700, 705. These authorities, we think, clearly establish the principle that any act done by a corporation which is directly incidental to the proper exercise of its franchises cannot be *ultra vires*. The bank had the undoubted power to collect the debt owing to it, and in the exercise of that right it had the incidental power to exchange the debt for property from which it honestly and reasonably supposed it could more certainly realize the money. We have already held that the bank made the exchange for those reasons. The fact, if it be a fact, that the sequel showed such exchange to be disastrous to the bank could not affect the original power to make the exchange.

But we desire to place our ruling also upon another ground. We may concede that the contract of the bank to exchange the debt for the milling stock was *ultra vires*, and yet we cannot reverse this judgment. We notice first that this contract has been fully consummated upon both sides. The stock has been delivered with intent therewith to pay the debt. The stock has been accepted, and the evidences of indebtedness delivered to the debtor, with intent thereby to extinguish the debt. It is an executed contract, and one, as we shall see, wherein the law will leave the parties where it finds them. The authorities upon this subject are in confusion, and, unless carefully analyzed, may be deemed contradictory. The term "*ultra vires*" has been used without accurate discrimination. Certain contracts on the part of corporations may be prohibited by positive law, either statutory or common. Where such contracts are made by corporations, they are, of course, unlawful. They are *mala prohibita*, and void, for the same reason that the prohibited contract of an individual would be void. Yet courts have termed them *ultra vires*, and have then proceeded to say that *ultra vires* contracts were void.

and might be disregarded at pleasure. More properly speaking, *ultra vires* contracts of a corporation are such as do not in any manner serve the accomplishment of the purposes for which the corporation is chartered. They are contracts not positively forbidden, but impliedly forbidden, because not expressly or impliedly authorized. Mr. Zane, in his late and valuable work on Banks and Banking, at page 61 et seq., is inclined to draw the line just here, and say that all so-called *ultra vires* contracts that are made in violation of positive law are void, while all *ultra vires* contracts that are in excess of granted powers are voidable merely, and voidable only prior to completed execution. We are not required to go so far in this case. Perhaps we are not prepared to go quite so far, but where a contract is *ultra vires*, not because the corporation may not make it under any circumstances, but by reason of the particular circumstances under which it is made, then it is never void, and the plea of *ultra vires* cannot be made by either party after the contract has been executed by the other party. The case under consideration well illustrates our meaning. If the contract in question be *ultra vires*, it is not because it is prohibited by positive law, or because it is a contract that the bank could not make under any circumstances. It is conceded that the bank might take the corporate stock as collateral security for a present loan, and in order to collect the loan it might sell the collateral, and become the purchaser and legal owner thereof. It is also conceded that the bank might, in the language of counsel, "take such stock in compromise of a doubtful or contested claim, where to do so would prevent a possible loss. If *ultra vires*, it was because of the circumstances under which it was made, and, as already stated, the plea of *ultra vires* will not avail. We enforced this principle in the recent case of *Clarke v. Olson*, 9 N. D. 364, 83 N. W. Rep. 519. We rested the decision there upon a quotation, with authorities cited, from *Lewis v. Association*, 98 Wis. 203, 73 N. W. Rep. 793, 39 L. R. A. 559. But, as the proposition is vigorously assailed in this case, it may be well to examine the authorities further. We first cite the cases relied upon by appellant, some of which, it may be conceded, fully support his contention. The first is *Central Transp. Co. v. Pullman's Palace-Car Co.* 139 U. S. 24, 11 Sup. Ct. Rep. 478, 35 L. Ed. 55. The holding in that case is in no manner in conflict with our ruling. The court there held the contract void because it was one that the corporation could not make under any circumstances. From the case of *Miller v. Insurance Co.* (Tenn. Sup.) 21 S. W. Rep. 39, 20 L. R. A. 765, which is a Tennessee case, and the authorities therein cited, it would appear that all *ultra vires* contracts are held void in that state. *McCormick v. Bank*, 165 U. S. 538, 17 Sup. Ct. Rep. 433, 41 L. Ed. 817, was a suit on a contract made by the bank at a time when it had no authority to contract. The contract was held void. See, also, *Franklin Co. v. Lewiston Institution for Savings*, 68 Me. 43; *Bailey v. Gaslight Co.*, 27 N. J. Eq. 196; *Thomas v. Railroad Co.*, 101 U. S. 71, 25 L. Ed. 950. But, as fully sustaining

our views as herein before expressed, we call attention to the cases cited in the extended notes to *Central Transp. Co. v. Pullman's Palace-Car Co.*, as reported in 35 L. Ed. 55, and also notes to *Miller v. Insurance Co.*, supra, and cite also *Arms Co. v. Barlow*, 63 N. Y. 62; *Parish v. Wheeler*, 22 N. Y. 496; *Navigation Co. v. Weed*, 17 Barb. 378; *Darst v. Gale*, 83 Ill. 136; *Carson City Sav. Bank v. Carson City Elev. Co.*, 90 Mich. 550, 51 N. W. Rep. 641; *Holmes & Griggs Mfg. Co. v. Holmes & Wessell Metal Co.*, 127 N. Y. 260, 27 N. E. Rep. 831; *Raft Co. v. Roach*, 97 N. Y. 378; *State Board of Agriculture v. Citizens' St. Ry. Co.*, 47 Ind. 407; *Oil Creek & A. R. R. Co. v. Penn. Transp. Co.*, 83 Pa. St. 160; *Ditch Co. v. Zellerbach*, 37 Cal. 543; *Bank v. Case*, 99 U. S. 627, 25 L. Ed. 448; *Bank v. Matthews*, 98 U. S. 621, 25 L. Ed. 188; *Kadish v. Ass'n.*, 151 Ill. 531, 38 N. E. Rep. 236; *Anderson v. Bank*, 5 N. D. 451, 67 N. W. Rep. 821; *Sioux Falls Nat. Bank v. First Nat. Bank*, 6 Dak. 113, 50 N. W. Rep. 829; *Tootle v. Bank*, 6 Wash. 181, 33 Pac. Rep. 345; *Voltz v. Bank*, 158 Ill. 532, 42 N. E. Rep. 69; *Bank v. Porter*, 52 Mo. App. 244; *Town of Lexington v. Union Nat. Bank*, 75 Miss. 1, 22 South. Rep. 291; *Cameron v. Bank* (Tex. Civ. App.) 34 S. W. Rep. 178. The judgment of the District Court of Grand Forks county in this case is in all things affirmed. All concur.

(84 N. W. Rep. 8.)

WM. J. ANDERSON vs. J. G. GORDON, *et al.*

Opinion filed November 3, 1900.

Supreme Court—Jurisdiction—Injunction.

This court, in the exercise of its original jurisdiction, can issue a writ of injunction only upon an information therefor filed by the attorney general, or under his authority, and by leave of court first obtained, and in the name of the state.

Application by William J. Anderson for a writ of injunction against J. G. Gordon, county auditor of Nelson county, and John W. Scott, county auditor of Grand Forks county.

Writ denied.

Bosard & Bosard, for relator.

Cochrane & Corliss for defendants.

BARTHOLOMEW, C. J. The plaintiff, William J. Anderson, alleging that he is a citizen of the United States, a resident and qualified elector of the First ward of the city of Grand Forks, First Judicial District of North Dakota, and appearing by his counsel, Messrs. Bosard & Bosard, who disclaim acting under the direction or by the authority of the attorney general, and without any allegation that the attorney general is unable or unwilling to act in the matter, seeks to invoke the original jurisdiction of this court, and procure

an injunction restraining the auditors of the counties of Grand Forks and Nelson, composing the First Judicial District, from placing the name of Charles J. Fisk upon the official ballot to be used at the approaching general election as a candidate for the office of judge of said district. Plaintiff desired to accomplish a restraint, but our statute (section 5343, Rev. Codes) having abolished the writ of injunction as a provisional remedy, and substituted an injunction by order, and as such order could only be made in a pending case, the plaintiff caused a summons and complaint to be served upon the defendants as in an action in the District Court, and also served notice of an application to this court for a restraining order. When the application was made it was suggested by the court that it could exercise original jurisdiction only through jurisdictional writs, and that it could not acquire jurisdiction through service of summons. Thereupon counsel moved for leave to file his complaint as an information for writ of injunction, and that a preliminary injunction issue thereon. The defendants appear specially and object to this proceeding upon the grounds that the state is not a party plaintiff directly or upon relation, and that leave to file the information is not asked by the attorney general or by his authority. We think these objections are well taken. It is true that under the weight of modern authority, voiced by section 5232, Rev. Codes, where the question is one of general interest, one party may, without showing any special interest in himself, sue for all. The state need not be made a party plaintiff in any manner. But that is not the question here. The state constitution (section 87) declares that this court "shall have power to issue writs of habeas corpus, mandamus, quo warranto, certiorari, injunctions and such other original and remedial writs as may be necessary to the proper exercise of its jurisdiction, and shall have power to hear and determine the same." We are not, in this case, concerned about those remedial writs through which this court may exercise its superintending control over inferior courts. Plaintiff asks an original writ. It must be a jurisdictional writ, because it is only through the writ that this court obtains original jurisdiction of the controversy. Injunction is known as the great chancery writ. It was not a prerogative writ, not a writ of right, not a jurisdictional writ, not an original writ, but was a judicial writ used in aid of a jurisdiction that had already attached. In the constitution we find it grouped with the great common-law prerogative writs that might always be used as original writs. It seems to be the mandate of the constitution that this court should use the writ of injunction, in cases where that is the appropriate writ, in the same manner and by the same means employed in the use of the prerogative writs with which it is grouped. Either that must be done, or a court of limited original jurisdiction must acknowledge its inability to employ the writ of injunction as an original writ. But courts cannot disregard or emasculate the plain provisions of a fundamental law. It has, therefore, been held, under

identical language, that courts must treat the writ of injunction as a *quasi* prerogative writ. That such is the proper course is conclusively shown in the masterful opinion of Chief Justice Ryan in *Attorney General v. Chicago & N. W. Ry. Co.*, 35 Wis. 425. See page 512 et seq. But, treating it as a prerogative writ, it must be procured as prerogative writs always have been secured; and that is upon an information filed by the law officer of the state, or with his authority, upon leave granted, and in the name of the state. This is the practice prescribed by this court in *State v. Nelson Co.*, 1 N. D. 88, 45 N. W. Rep. 33, 8 L. R. A. 283. Since the decision of that case this court has upon several occasions been called upon to exercise its original jurisdiction in mandamus cases. This is the first instance since the *Nelson County Case* where an injunction has been asked. It is for this reason that we have stopped to point out why our original jurisdiction could be exercised in the issuance of that writ only in the same manner in which it is exercised in procuring the issuance of prerogative writs proper. The application for leave to file the information not being made by the attorney general, or in the name of the state, the writ must be denied. All concur.

(83 N. W. Rep. 993.)

MCCORMICK HARVESTING MACHINE CO. vs. WILLIAM RAE, et al.

Opinion filed November 26, 1900.

Extension of Time to Debtor—Release of Surety.

A creditor, by extending time of payment to his debtor without the knowledge or consent of a surety, thereby releases such surety. It is necessary, however, to the validity of such extension, that it be upon a sufficient consideration, and to a definite time.

Negotiable Instruments—Answer—Insufficient Averments to Show Discharge of Surety.

The answer of a surety to a complaint on promissory notes which merely alleges that the notes were extended without his knowledge or consent, and does not allege the time to which they were extended, or that the payee agreed to extend time of payment for any definite period, does not allege a valid extension, and states no defense. It is accordingly held that it was error to overrule a demurrer to such answer based upon the ground that it did not state facts sufficient to constitute a defense.

Appeal from District Court, Cass County; *Pollock, J.*

Action by the McCormick Harvesting Machine Company against William Rae and others. From a judgment overruling a demurrer to the answer of William Rae, plaintiff appeals.

Reversed.

Benton, Lovell & Holt, for appellant.

A co-maker of a promissory note, though a surety, is not entitled to notice of dishonor. *Edwards, Bills & Notes*, 454; 1 *Parson's*

Notes & Bills, 236; *Hartman v. Burlingham*, 9 Cal. 557; *Fitch v. Bank*, 97 Ind. 211; *Bond v. Storrs*, 13 Conn. 412; *Hunnicut v. Perot*, 27 S. E. Rep. 787; *Butner v. Liebig*, 38 Mo. 188; *Treadway v. Antisdal*, 86 Mich. 82; *Carpenter v. McLaughlin*, 12 R. I. 270; *Scott v. Shirks*, 60 Ind. 160. Respondent's answer alleges that he, as surety, is discharged by an extension of the obligation granted by the creditor to his principals. The allegation of extension is a legal conclusion. There would be no legal extension of the time of payment of the notes in suit without a valid agreement therefor, and there is no averment that the extension was for a definite period of time. 2 Randolph on Commercial Paper, 642; *Olson v. Chism*, 51 N. E. Rep. 373; *Smith v. Freyler*, 1 Pac. Rep. 214, 4 Mont. 498; *Glickhauf v. Hirschorn*, 73 Ill. 574; *Prather v. Young*, 67 Ind. 480; *Voris v. Schott*, 50 N. E. Rep. 484; *Winnie v. Colorado*, 3 Col. 158; *Bank of Commerce v. Humphrey*, 6 S. D. 415, 61 N. W. Rep. 444, 12 Enc. Pl. & Pr. 1024-1026, n. 2.

Cole & Johnson, for respondent.

Defendant's answer sufficiently pleads the extension of time of payment, the consideration therefor, and the fact that respondent had no knowledge of such extension. Bigelow on Bills & Notes, p. 584; *Dohn v. Bronger*, 47 S. W. Rep. 619; 2 Daniels, Neg. Instr. 1312; *St. Paul Trust Co. v. St. Paul Chamber of Commerce*, 73 N. W. Rep. 408; *Moulton v. Posten*, 8 N. W. Rep. 607; *Lambert v. Shitter*, 17 N. W. Rep. 187; *Stevens v. Oaks*, 25 N. W. Rep. 309; *State National Bank v. Stratton*, 50 S. W. Rep. 631; *Lambert v. Shetler*, 32 N. W. Rep. 424; *Wendling v. Taylor*, 10 N. W. Rep. 675; *Bangs v. Strong*, 16 N. Y. Com. Law, 578; *Huffman v. Hulbert*, 12 N. Y. Com. Law, 412; § 3866-3871-3872, Rev. Codes. An extension that would cover a reasonable time is a definite extension and releases the surety, although no definite time to which the extension was made is mentioned. § 3915, Rev. Codes; *Acme Harvester Co. v. Axtell*, 5 N. D. 315, 65 N. W. Rep. 680; *Liljen-gren Furniture Co. v. Mead*, 44 N. W. Rep. 306; *Greenwood v. Davis*, 64 N. W. Rep. 26.

YOUNG, J. Action on three promissory notes executed and delivered by the defendants J. T. Rae, Robert Rae, and William Rae to plaintiff. The two defendants first named did not answer. The defense attempted to be interposed by William Rae is that he is merely a surety on said notes, and that he has been released by an extension of time granted by the payee to the principals without his knowledge or consent. Plaintiff demurred to the answer on the ground that it does not state facts sufficient to constitute a defense. This was overruled, and plaintiff appeals from the order.

The law is settled beyond dispute that, where a creditor and the principal debtor make a valid contract extending the time of payment without the knowledge and consent of a surety, the surety is discharged from his liability. It is equally well settled that a contract of extension, to be valid and operative, must be between the

creditor and principal debtor. It must rest upon a sufficient consideration, and the extension agreed upon must be for a definite time; in other words, it must be such an agreement as precludes the creditor from enforcing payment against the principal until the expiration of a specified period. *Draper v. Romeyn*, 18 Barb. 166; *Wheeler v. Washburn*, 24 Vt. 293; *Pierce v. Goldsberry*, 31 Ind. 52; *Board v. Covington*, 26 Miss. 471. "To discharge a surety by extension of time, there must be a sufficient consideration, and a time definitely fixed." *Gardner v. Watson*, 13 Ill. 347; *Flynn v. Mudd*, 27 Ill. 326; *Galbraith v. Fullerton*, 53 Ill. 126; *Glickauf v. Hirschhorn*, 73 Ill. 574; *Winne v. Springs Co.*, 3 Colo. 155; *Starret v. Burkhalter*, 70 Ind. 285; *Arms v. Beitman*, 73 Ind. 85; *Henry v. Gilliland*, 103 Ind. 177, 2 N. E. Rep. 360; *Beach v. Zimmerman*, 106 Ind. 495, 7 N. E. Rep. 237. And a surety is released only when the extension is for a definite period. *Voris v. Shotts* (Ind. App.) 50 N. E. Rep. 484. Where the consent to forbear is for a loose and uncertain period, the creditor's hands are not tied, and the surety is not released. *Jarvis v. Hyatt*, 43 Ind. 163; *Miller v. Stem*, 2 Pa. St. 286; *Rand. Com. Paper* (2d Ed.) § § 954, 958, 1820. See, also, *Bank v. Torrey* (S. D.) 73 N. W. Rep. 193. The question presented by the demurrer in the case at bar is whether the answer interposed alleges a valid contract of extension. If it does, it states a defense; if not, the demurrer should have been sustained. The allegations relative to the contract of extension are as follows: "That said notes were extended for payment by plaintiff to the defendants Robert Rae and J. T. Rae in the year 1897 in consideration of the fact that said two defendants did then buy from said plaintiff two new harvesting machines, and that said extension was given without the knowledge, consent, acquiescence, or approval of this defendant." Does this answer allege such a contract of extension as would discharge a surety? It is entirely clear that it does not. We may assume, without deciding the question, that a consideration for the extension is alleged in the answer, and further assume that the allegation "that said notes were extended" is an allegation of an issuable fact, and not a mere conclusion of law. Yet it wholly fails to allege a material fact, which, under the authorities, is vital to a valid contract of extension, namely, that plaintiff agreed to extend the time of payment to some fixed and definite period. As has been seen, this element of a contract of extension is as vital as the consideration. The cases are numerous where answers of sureties pleading a release because of extension of time have been held bad upon demurrer for failure to allege a sufficient consideration for the alleged contract of extension. *Galbraith v. Fullerton*, supra; *Flynn v. Mudd*, supra. For the same reason an answer which does not allege the time to which payment was extended states no defense, and will be held bad on demurrer. Such have been the holdings of the courts whenever the question has been presented. *Glickauf v. Hirschhorn*, 73 Ill. 574. In *Meniffee v. Clark*, 35 Ind. 304, an answer was held insufficient on demurrer solely because it did "not allege any definite time

for which the extension was given," although it was held sufficient as to allegation of consideration. This case was followed and approved in *Abel v. Alexander*, 45 Ind. 523; *Bucklen v. Huff*, 53 Ind. 474. See, also, *Olson v. Chism* (Ind. App.) 51 N. E. Rep. 373, and cases cited in opinion. Counsel for respondent urge, however, that under the new procedure, requiring the allegations of pleadings to be liberally construed, which rule has been adopted in this state, and is found in section 5283, Rev. Codes, the answer is sufficient. It is clear that no rule of construction, however liberal, can supply and arbitrarily inject into a pleading an averment of a material fact which has been wholly omitted. Furthermore, the rule applies to allegations which are made, and are ambiguous and defective, and has no reference to the omission of material averments. Phillips, in his work on Code Pleading (section 352), says: "In the application of this canon of construction it must be borne in mind that it relates to matters of form, and in no way dispenses with the fundamental requisites of a pleading," which are that all traversable facts shall be stated issuably. Under the authorities it is essential to the validity of a contract of extension that the agreement to extend shall be to a definite time. The answer contains no such averment, and accordingly does not state a defense. The District Court is directed to vacate its order, and enter an order sustaining the demurrer. All concur.

(84 N. W. Rep. 346.)

GULL RIVER LUMBER COMPANY vs. R. H. BRIGGS.

Opinion filed November 16, 1900.

Mechanic's Lien—Foreclosure.

To entitle a party to foreclose a mechanic's lien upon a building only, and sell the same separate and apart from the land upon which it stands, it is necessary, under the present mechanic's lien law of this state (sections 4788-4801, inclusive, Rev. Codes), that the complaint should show either that the building was erected by one who had a leasehold interest in the land whereon the building is situated, and that the lease has become forfeited, or that there were existing liens upon the land at the time the materials were furnished or labor done for which the lien is claimed.

Appeal from District Court, Barnes County; *Glaspell, J.*

Action by the Gull River Lumber Company against R. H. Briggs. Judgment sustaining a demurrer to the complaint, and plaintiff appeals.

Affirmed.

Young & Combs, for appellant.

Complainant is not required to allege and prove the precise title of the party with whom he made the contract to the land, for the lien is enforced only upon such interest as he has in the premises. *Miller v. Bergenthal*, 20 Wis. 474, 7 N. W. Rep. 356; *Moritz v.*

Splitt, 55 Wis. 441, 13 N. W. Rep. 555; Jones on Liens, § 1592. The averments of a petition for a mechanic's lien, in regard to the interests of the defendant, are sufficient to sustain a decree against him if enough appears to disclose the rights of the parties and to admit all evidence bearing upon these rights. *Henderson v. Connolly*, 14 N. E. Rep. 1; *Kice v. Hall*, 41 Wis. 453; *Shaw v. Allen*, 24 Wis. 563; *Chisholm v. Williams*, 128 Ill. 115; Jones on Liens, §§ 1591-1592. A mechanic's lien, for materials furnished, may attach not only to the lien-hold estate, but to estates and interests of the most minute and transient character. *Hathaway v. Davis*, 5 Pac. Rep. 29; Phillips, Mech. Liens, § 19; *Turney v. Saunders*, 4 Scam. 527; *Donaldson v. Holmes*, 23 Ill. 85. The party in possession or occupancy of land upon which a structure, for his use and benefit, is erected is presumed to have such an interest therein as is chargeable with a mechanic's lien, and such presumption continues until the contrary is made to appear. Phillips, Mech. Liens, § 187; *McCulloch v. Caldwell*, 5 Ark. 237; *Dean v. Pyncheon*, 3 Chand. (Wis.) 9. In an action to foreclose a lien for materials furnished the petition contained no allegation in the body thereof that the contract to furnish materials was with the owner, but the petition referred to the lien statement attached, which lien statement clearly disclosed the contract to furnish materials was with the owner. Held, that the petition sufficiently disclosed that the contract was with the owner. *Jarvis, Etc. Co. v. Sutton*, 26 Pac. Rep. 406. Notwithstanding the averment in the complaint that the state of North Dakota owned the land in fee, nevertheless the person with whom the contract for the purchase of material was made was, under the averment, the owner of the building constructed with said material; was also the purchaser and occupant of the land upon which it was situated. The interest of Haynes in the land was such as would be subject to the attachment of the lien. Haynes being in possession is presumed to be there rightfully. *Mason v. Park*, 3 Scam. 532; *Davis v. Easley*, 13 Ill. 192. The land may be subjected to sale, and whatever interest Haynes may have therein, be it more or less, will vest in the purchaser. *Sweitzer v. Scyles*, 3 Gil. 529; *Talbot v. Chamberlain*, 3 Paige 220; *Dean v. Pyncheon*, 3 Chand. 9; *Jackson v. Garnsey*, 16 Johns. 192; *Jackson v. Parker*, 9 Cow. 73; *Jackson v. Graham*, 3 Caines Cas. 189; *Chambers v. Benoist*, 25 Mo. App. 520; *Jackson v. Towne*, 4 Cow. 602; *Steigleman v. McBride*, 17 Ill. 299; *McCulloch v. Caldwell*, 5 Ark. 237. The complaint contains traversable allegations of all the essentials to entitle plaintiff to maintain and enforce its lien and it was not pregnable to demur. *Howe v. Smith*, 6 N. D. 432; *Rush Owen Lumber Co. v. Fitch*, 3 S. D. 213; *Red River Lumber Co. v. Congregation*, 7 N. D. 46; *McCrea v. Craig*, 23 Cal. 522; *McCoy v. Quick*, 30 Wis. 521; *Miller v. Bergenthal*, 50 Wis. 474; *McFadden v. Stark*, 58 Ark. 7; *Caddington v. Beebe*, 29 N. J. L. 550. The intention of the statute, §§ 4788-4794. Rev. Codes, is to give a lien upon both the land and the building, or either of them. The

statute is remedial and the claim for lien being sufficient in substance it will be sustained. *McCumber v. Bigelow*, 126 Cal. 9; *McGinty v. Morgan*, 122 Cal. 103; *Mahon v. Surerus*, 9 N. D. 57, 81 N. W. Rep. 64. If the statute gives a lien to the material man upon both the land and the building, or either of them, then it is unnecessary to show that the person with whom the contract for the purchase of the materials was made had no legal interest in the land itself. A right to a lien upon the improvements may exist without any contract with the owner of the fee, but by contract with the owner of the improvements. *Lane v. Snow*, 66 Ia. 544, 24 N. W. Rep. 35; *Jones on Liens*, § 1250.

Lockerby & White, for respondent.

The notice for a mechanic's lien filed by appellant is void on its face. It recites that the contract has not been completed. *Philips on Mech. Liens*, 223; *Roylance v. St. Louis Hotel Co.*, 15 Pac. Rep. 777; 20 Pac. Rep. 576; *Seaton v. Chamberlain*, 4 Pac. Rep. 89; *Schwartz v. Knight*, 16 Pac. Rep. 235; *Catlin v. Douglas*, 33 Fed. Rep. 569; *Davis v. Bullard*, 32 Kan. 234, 4 Pac. Rep. 75; *Seaton v. Chamberlain*, 32 Kan. 239, 4 Pac. Rep. 89; *Crawford v. Blackman*, 30 Kan. 527, 1 Pac. Rep. 136; 2 *Jones on Liens*, § 1430. The complaint is fatally defective in not alleging that Haynes had some estate or interest in the land upon which the building was erected. *Peck v. Bridewell*, 6 Mo. App. 451; *Clarke v. Raymon*, 27 Mich. 456; *Shaw v. Allen*, 24 Wis. 563; *Monroe v. West*, 12 Ia. 119; *Thaxter v. Williams*, 14 Pick. 49. The building becomes a part of the real estate as soon as it is attached to the land, and the building is all the debtor in such case could claim to own. The building could never be sold as the debtor's personal property, or levied upon as his real estate. 2 *Jones on Liens*, § 1247; *Rabbit v. Condon*, 27 N. J. L. 159; *Wager v. Briscoe*, 38 Mich. 587; *Haynes v. Fessenden*, 106 Mass. 228. The complaint, independent of the notice, must state a cause of action. *Shaw v. Allen*, 24 Wis. 563; *Altman v. Siglinger*, 2 S. D. 446.

BARTHOLOMEW, C. J. Action to foreclose a mechanic's lien. A demurrer to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action was sustained, and plaintiff appeals. The lien is sought to be imposed upon the building only, and for materials that entered into its construction. The defendant is the vendee of the party by whom the building was erected. No personal judgment is claimed, or, under the complaint, could be recovered, in this case, against any one. Unless the complaint entitles plaintiff to the foreclosure of the lien claimed, it cannot be sustained for any purpose. To entitle a party to a lien for materials furnished to be used in the construction of a building, such materials must be furnished pursuant to a contract with the owner of the land upon which the building is situate. Such is the clear requirement of section 4788, Rev. Codes. The complaint in this case alleges that at the time such materials were furnished the

state of North Dakota was, and ever since has been, the owner in fee of the land upon which the building is situated. No contract with the state is claimed, but it is alleged that the contract was made with one Haynes, defendant's vendor of the building. It is claimed that the complaint sufficiently shows that the building was erected for the immediate use and benefit of said Haynes, and that by reason of that fact, and for the purpose of the mechanic's lien law, he was the "owner" of the land, under section 4798, Rev. Codes. This section is identical with section 5483, Comp. Laws. In the case of *Mahon v. Surerus*, 9 N. D. 17, 81 N. W. Rep. 64, this court construed the latter section, and held that a contract made with one who had a homestead filing upon land would support a lien upon the building for materials used by such party in the construction of a house upon said land for his own use, notwithstanding the fact that under section 2296, Rev. St. U. S., the land could not be subjected to or sold under any such lien. This holding was based upon the fact that under section 5480, Comp. Laws, the plaintiff might, in every case, enforce his lien against the building without selling any interest whatever in the land upon which it stood. That feature of the statute as it appeared in the Compiled Laws has been materially changed by the statute as it appears in the Revised Codes. It is true that the language giving the lien as found in section 4788, Rev. Codes, is the same as the former law, and declares that the party shall have "a lien upon such building, erection or improvement and upon the land belonging to such owner on which the same is situated." In *Mahon v. Surerus* we held that this language imported two separate liens, one upon the building and one upon the land. We so held because, as stated, under section 5480, Comp. Laws, the plaintiff could always enforce his lien upon the building alone, and remove it from the land. This cannot now be done. The buildings can now be sold and removed only under the conditions prescribed in sections 4794 and 4795, Rev. Codes. The first of these sections declares that the entire land upon which the building is situated "shall be subject to all liens created by this chapter to the extent of all right, title and interest owned therein by the owner thereof for whose immediate use or benefit such labor was done or things furnished, and when the interest owned in such land by such owner of such building, erection or other improvement is only a leasehold interest, the forfeiture of such lease for the nonpayment of rent or for noncompliance with any of the other stipulations therein shall not forfeit or impair such lien so far as it concerns such buildings, erections or improvements, but the same may be sold to satisfy such lien and be removed within thirty days after the sale thereof by the purchaser." From this section it appears that, where materials are sold to one having a leasehold interest in land for the purpose of erecting a building upon such land, the lien for such materials must be enforced against the leasehold estate, including the building, which, as to the lienholder, becomes a part of the leasehold estate. But the lien cannot be defeated by a forfeiture of

the leasehold interest, thus cutting off all estate in the land to which the lien could attach. In that event, and only in that event, the lien may be enforced against the building alone, and it may be removed from the land. Section 4795 provides that the liens for the things stated shall attach to the buildings or improvements in preference to any prior lien on the land, and, in order to give effect to this provision, it is declared that a court may, where there are prior incumbrances upon the land, direct that the building alone be sold to satisfy the mechanic's lien, and removed from the premises. It is only under these conditions that the buildings can be removed, and it is clear that in each the party erecting the building must have an interest or estate in the land that might be the subject of a judicial sale and transfer but for the conditions named in the statute. In all other cases the building must remain upon the land; but a lien upon a building that could in no manner be utilized would be so barren of benefits that we cannot presume the legislature ever intended to confer it. As the law now stands in this state, no mechanic's lien can attach to the building or the land unless the party for whose immediate use and benefit the building is erected has some estate or interest in the land. Our present statute would, perhaps, be more symmetrical if section 5483, Com. Laws,—being section 4798, Rev. Codes,—had been changed to conform to other changes made. We cannot conceive that it was ever intended to permit a trespasser upon land, by erecting a building thereon for his own "immediate use and benefit," to charge the land with a lien for the value of the work and materials in the building. The complaint in this case contains no allegations showing that the party who purchased the materials and erected the building had any leasehold interest in the land upon which the building was placed, or that any such lease, if it existed, had been forfeited for any reason. Nor is there any allegation that there were any existing liens upon the land when the materials were furnished for the building that was erected thereon. Hence plaintiff is not entitled to any separate sale of the building. That is, however, the specific relief that he asks, and certainly his complaint entitles him to no other. The demurrer was properly sustained. Affirmed. All concur.

(84 N. W. Rep. 349.)

FRED HENNIGES, *et al* vs. JOHN PASCHKE, *et al*.

Opinion filed November 20, 1900.

Deed—Designation of Grantee.

A deed of real estate, to be effective as a conveyance of title, must designate a grantee, otherwise no title passes; but it is sufficient if the deed, when construed as a whole, distinguishes the grantee from the rest of the world.

Sufficient Description of Grantee in a Deed.

A certain deed of real estate examined, and *held* that it sufficiently describes the grantee, and is valid as a conveyance.

Failure to Record Assignment of Mortgage—Rights of Subsequent Purchaser.

Upon the equitable principle that, where one of two or more innocent persons must suffer for the wrongful act of a third, he must suffer who left it in the power of such third person to do the wrong, it is *Held* that plaintiffs, who are purchasers of certain promissory notes secured by a real estate mortgage, by neglecting to take and place of record an assignment of the same, forfeited their rights under said mortgage as against the defendant, who purchased the mortgaged premises in good faith, and in reliance upon the record title.

Rights of Bona Fide Purchaser—Conveyances.

Assignments of real estate mortgages are conveyances within the meaning of section 3594, Rev. Codes, and under said section, for the purpose of notice, must be recorded, and, if not so recorded, are void as to subsequent purchasers of the mortgaged premises who purchase in good faith and for a valuable consideration, and first record the conveyances.

Appeal from District Court, Walsh County; *Sauter, J.*
Action by Fred Henniges and others against John Johnson and others. Judgment for defendant John Paschke, and plaintiffs appeal. Affirmed.

J. E. Gray, for appellant.

The general rule of law is that a deed must designate the grantee, otherwise it is a nullity and passes no title. *Allen v. Allen*, 51 N. W. Rep. 473; *Allen v. Withrow*, 110 U. S. 119, 28 L. Ed. 90; *Paul v. Moody*, 7 Greenl. 455; *Whitaker v. Miller*, 83 Ill. 311; *Chase v. Palmer*, 29 Ill. 306, 9 Am. & Eng. Enc. L. (2d Ed.) 132, and note; *Hardin v. Hardin*, 11 S. E. Rep. 102. The grantee under a quitclaim deed is not a bona fide purchaser. *Finch v. Trent*, 24 S. W. Rep. 679; *American Mortgage Co. v. Hutchinson*, 24 Pac. Rep. 515. The plaintiff, Henniges, and Bradley are each bona fide holders, for value, before maturity, of the promissory notes, and are entitled to a decree of foreclosure for the amount represented by their notes as against the defendants. *Hollinshead v. Stuart & Co.*, 77 N. W. Rep. 89; *Stolzman v. Wyman*, 77 N. W. Rep. 285; *Purdy v. Huntington*, 42 N. Y. 344. Paschke is not such a bona fide purchaser as will be protected against the lien of plaintiff's mortgage. *Mathew v. Jones*, 66 N. W. Rep. 622; *Peterborough Savings Bank v. Pierce*, 75 N. W. Rep. 20; *Babcock v. Young*, 75 N. W. Rep. 302; *Wilson v. Campbell*, 68 N. W. Rep. 278; *Williams v. Keyes*, 51 N. W. Rep. 520; *Dutton v. Ives*, 5 Mich. 515; *Joy v. Vance*, 62 N. W. Rep. 140; *Bromley v. Lathrop*, 63 N. W. Rep. 510; *Trowbridge v. Ross*, 63 N. W. Rep. 534; *Windle v. Bonbrake*, 23 Fed. Rep. 165. The assignments of mortgage, by Walker to Cashel, and by Cashel to Walker, and the satisfaction by F. T. Walker are nullities. Rev. Codes, §§ 4694 and 3529; *Polhemus v. Trainer*, 30 Cal. 685; *Loan Ass'n. v. Dowling*, 74 N. W. Rep. 438; *Peter v. Jamestown*, 5 Cal. 335. Paschke was not a good faith

purchaser because he had notice of facts which would put a prudent man upon inquiry. *Gress v. Evans*, 1 Dak. 371.

Cochrane & Corliss, for respondent.

The fact that John Paschke paid for the land after the notice of *lis pendens* had been filed does not render him chargeable with constructive notice of the pendency of the action, because the statute declares that every person whose conveyance or incumbrance is subsequently executed or subsequently recorded shall be deemed a subsequent purchaser or incumbrancer, and shall be bound by proceedings taken after the filing of the notice. § 5251, Rev. Codes. The filing of *lis pendens* did not give Paschke notice that there was an action pending or that the plaintiffs were the owners of the mortgage in question. The records where the ownership should have been disclosed did not disclose the mortgage. 2 Jones, Real Property, § 1559. The doctrine of *lis pendens* is not carried to the extent of making it constructive notice of a prior unregistered deed; as, for instance, proceedings to foreclose an unrecorded mortgage do not constitute such a *lis pendens* as would be notice to a purchaser of mortgaged property. *Barker v. Bartlett*, 45 Pac. Rep. 1084; 1 Jones, Mortg., § 583; *Newman v. Chapman*, 14 Am. Dec. 766; Story's Eq. Jur. § 406; *Wyatt v. Barwell*, 19 Ves. 435; 1 Pindgree, Mortg. § 744; *Douglas v. McCrackin*, 52 Ga. 596. The doctrine of *lis pendens* does not rest upon the idea of notice. *Jennings v. Kierman*, 55 Pac. Rep. 443; *Hennington v. Hennington*, 27 Mo. 560; *Lamont v. Chessier*, 65 N. Y. 30, 13 Am. & Eng. Enc. L. 870, 871; 2 Devlin, Deeds, § 70. In an action to foreclose a mortgage the statute relating to the filing of a *lis pendens* is not applicable. § 5251 Rev. Codes; *Brown v. Cohn*, 69 N. W. Rep. 71. *Lis pendens* statutes do not create the law of *lis pendens* in the particular jurisdiction in which they are operative, but may rather be regarded as imposing limitations upon the common law otherwise existing upon the subject. The common law rule of *lis pendens* must not be regarded as in effect in each state except in so far as it has been modified by the statutes. 56 Am. St. Rep. 855, 856, note. The common law rule of *lis pendens* controlled this action of foreclosure, and while it is true that the defendant did not pay for the property until after the complaint and *lis pendens* had been filed, yet he fully paid for it before the summons in the action was served on any of the defendants. It therefore follows that the action was not pending for the purpose of constituting notice to defendant at the time he purchased; for, at common law, to constitute a *lis pendens*, the summons or subpoena must be served on some of the defendants. 13 Am. & Eng. Enc. L. 883; *Leitch v. Wells*, 48 N. Y. 585, 610; *Duff v. McDough*, 25 Atl. Rep. 608; *Bank v. Taylor*, 23 N. E. Rep. 347; *Grant v. Bennett*, 96 Ill. 513, 522; *Hennington v. Hennington*, 27 Mo. 560; *Staples v. Handley*, 12 S. W. Rep. 339; 2 Pomeroy, Eq. Jur. § 634; *Majors v. Caldwell*, 51 Cal. 478, 484; *Freeman*, Judg. § 195; *Müller v. Kershaw*, 23 Am. Dec. 183, 14 Am. Dec. 776 and

note; *Tigge v. Rozelan*, 84 Ill. App. 238; 1 Jones, Mortg. § 584; Wade, Notice, § 348. One who has a contract for the purchase of property pays the consideration and takes the conveyance after the action affecting it has been instituted, is not a purchaser *pendente lite*. *Parks v. Smoots Admin.*, 48 S. W. Rep. 146; *Norton v. Birge*, 35 Conn. 250; *Jennings v. Kierman*, 55 Pac. 443; *Grant v. Bennett*, 96 Ill. 515; *Kursheedt v. W. D. S. Inst.*, 118 N. Y. 363; *Lamont v. Chessier*, 65 N. Y. 30. Paschke bought and parted with his money relying upon the record and abstract showing that the mortgage in question was owned by F. T. Walker and upon a satisfaction thereof, which was in fact executed by F. T. Walker and was in the possession of John P. Walker at the time the transaction was consummated, being delivered to Paschke on the payment of the purchase money. Plaintiffs, by failing to obtain and record an assignment of the mortgage, placed it in the power of Walker to deceive defendant and cause him to believe that Walker had authority to satisfy the mortgage. Therefore, the law treats the transfer to plaintiffs as void as against the conveyance to Paschke. *Girardin v. Lampe*, 16 N. W. Rep. 614; *Merrill v. Luce*, 61 N. W. Rep. 43; *Livermore v. Maxwell*, 55 N. W. Rep. 37; *Merrill v. Hurley*, 62 N. W. Rep. 958; *Pickford v. Peebles*, 63 N. W. Rep. 779; *Quincy v. Ginesbach*, 60 N. W. Rep. 511; *Whipple v. Fowler*, 60 N. W. Rep. 15; *Pritchard v. Kalamazoo*, 47 N. W. Rep. 31; *Williams v. Jackson*, 2 Sup. Ct. Rep. 814; *Morris v. Beecher*, 45 N. W. Rep. 696; *Ogle v. Turpin*, 102 Ill. 148; *Ladd v. Campbell*, 56 Vt. 529; *Torrey v. Deavitt*, 53 Vt. 331; *Donaldson v. Grant*, 49 Pac. Rep. 779; *Van v. Marbury*, 14 South. Rep. 273; *Frank v. Snow*, 42 Pac. Rep. 484; *Moran v. Wheeler*, 27 S. W. Rep. 54; *Bank v. Anderson*, 14 Ia. 544; *Fallas v. Pierce*, 30 Wis. 443; *Van Kueren v. Corkins*, 66 N. Y. 77; *Bacon v. Van Schoonover*, 87 N. Y. 446; *Park v. Mackin*, 95 N. Y. 347; *Schwartz v. Leist*, 13 Ohio St. 419; *Parmeter v. Oakley*, 28 N. W. Rep. 653; *Cornog v. Fuller*, 30 Ia. 212; *Life Ins. Co. v. Talbot*, 14 N. E. Rep. 586; 1 Jones, Mortg. § 479; 1 Pingree, Mortg. § § 656, 657; *Bank v. Buck*, 44 Atl. Rep. 93; *Henderson v. Pilgrom*, 22 Tex. 664; *Swasey v. Emerson*, 46 N. E. Rep. 426; *Ferguson v. Glasford*, 35 N. W. Rep. 820; *Dawes v. Craig*, 17 N. W. Rep. 778; *Bowling v. Cook*, 39 Ia. 200; *Fletcher v. Kelley*, 55 N. W. Rep. 474; *Trust Co. v. Mfg. Co.*, 68 N. W. Rep. 587; *Lewis v. Kirk*, 28 Kan. 497; *James v. Curtis*, 78 N. W. Rep. 261. John P. Walker had authority to insert his own name as grantee and any consideration he might see fit to insert in the deed, in view of the fact that it is expressly found and was stipulated on the trial that F. T. Walker authorized John P. Walker to make such insertions. *Logan v. Miller*, 76 N. W. Rep. 1905; *McCleary v. Wakefield*, 2 L. R. A. 529, 41 N. W. Rep. 210; *State v. Mathews*, 10 L. R. A. 308, 25 Pac. Rep. 36; *Vought's Executors v. Vought*, 27 Atl. Rep. 489; *Jennings v. Jennings*, 34 Pac. Rep. 31; *Cribben v. Deal*, 27 Pac. Rep. 1046; *Spitler v. James*, 32 Ind. 202; *Swartz v. Ballou*, 47 Ia. 188; *Inhabitants v. Huntress*, 53 Me. 89; *Phelps v.*

Sullivan, 104 Mass. 36; *State v. Young*, 23 Minn. 551; *Field v. Stagg*, 52 Mo. 534; *Ex parte Kerwin*, 8 Cow. 148; *Stahl v. Berger*, 10 Sarg. & R. 170; *Wiley v. Moor*, 17 Sarg. & R. 438. In the absence of express authorization authority to fill in such blanks may be inferred from circumstances. *Van Etta v. Evenson*, 28 Wis. 33; *Davis v. Lee*, 59 Am. Dec. 267; *Inhabitants v. Huntress*, 53 Me. 89; *State v. Young*, 23 Minn. 551; *Swartz v. Ballou*, 47 Ia. 118; *Anguello v. Bowes*, 67 Cal. 447. As against a bona fide purchaser a grantor is estopped from denying that the instrument is his deed when he has signed the same in blank and intrusted the possession thereof to a third person. 2 Am. & Eng. Enc. L. (2d Ed.) 258, 259. The conclusive presumption is, in the absence of any evidence to the contrary, that the parties intended to convey the land to the one who appeared on the face of the instrument to have paid the consideration for the deed. *Mardes v. Meyros*, 28 S. W. Rep. 693; *Vineyard v. O'Connor*, 36 S. W. Rep. 424; *Newton v. McKay*, 29 Mich. 1; *Bay v. Posner*, 26 Atl. Rep. 1084. There was evidence on the trial tending to show that a consideration of one dollar was inserted in the deed, and subsequently John P. Walker wrote after the word "one" the word "thousand," changing the consideration from one to one thousand dollars. The grantor authorized an insertion of any consideration in the deed which John P. Walker might see fit to insert. The case is not one of alteration, but the exercise by the party to whom the deed was delivered of a lawful authority. Even if treated as an alteration it was not material because as altered the instrument does not speak a language different in legal effect from that which it originally spoke. 2 Am. & Eng. Enc. L. (2d Ed.) 185, 222. The recital of a consideration is an immaterial part of the deed. 6 Am. & Eng. Enc. L. (2d Ed.) 767. An the change of the consideration does not effect the legality of the instrument. *Cheek v. Nall*, 17 S. E. Rep. 80; *Murray v. Klinzing*, 29 Atl. Rep. 244; *Gardner v. Harback*, 21 Ill. 129; *Murray v. Klinzing*, 64 Conn. 78. Inasmuch as the title to the land passed the moment the deed was delivered the subsequent alteration of the deed could not effect the instrument as a conveyance, for the reason that it has already operated as a conveyance, and the law does not divest a party of his title merely because he has changed or destroyed the instrument which gave him title. 2 Am. & Eng. Enc. L. (2d Ed.) 197, 198; *Chessman v. Whitmore*, 23 Pick. 231.

YOUNG, J. This is an action to foreclose a real estate mortgage. The mortgage in question was given by John Johnson, one of the defendants herein, to one John P. Walker, to secure his eight promissory notes of even date therewith. It was placed on record on June 28, 1895, the day it was executed. Four of the notes were for \$500 each, and matured, respectively, on November 1, 1895, 1896, 1897, and 1898. The remaining four notes were for \$1,000 each and matured, respectively, on November 1, 1899, 1900, 1901, and 1902. All of the notes were transferred to plaintiffs before matur-

ity, and are unpaid. No written assignment of the mortgage was executed by the mortgagee to plaintiffs. Their rights in the mortgage arise from their ownership of the debt secured thereby. They seek also to have the title of the defendant Paschke, who claims to be a good-faith purchaser of the mortgaged premises, declared subject to the lien of the mortgage. The defendants Johnson and Walker did not answer. The answer of Paschke presents the only issues in the case. His answer, in effect, is that he is a good-faith purchaser of the mortgaged premises under the recording laws of this state, and that his title is, therefore, freed from the lien of the mortgage in suit. His claim is that when he purchased the land there was nothing of record to apprise him of the fact that plaintiffs had any interest in the mortgage, and that he purchased and paid for the mortgaged premises in reliance upon the record title, and received from his vendor a proper satisfaction of the mortgage in suit, executed by the record owner thereof. The trial court sustained his defense, and entered judgment declaring the mortgage void as to him, and confirming his title to the premises. Plaintiffs appeal from this judgment, and request a retrial of certain specified facts.

The facts upon which the case turns are, in the main, undisputed. Appellants urge two grounds in support of their contention that the lien of the mortgage is a paramount and first lien, and is not invalid as to Paschke, as found by the trial court. First it is claimed that by reason of a defective deed in Paschke's chain of title he is without any title or interest in the premises whatever. Second it is contended that, even if this deed is good, and he obtained title, nevertheless he is not a good-faith purchaser, and therefore took subject to plaintiffs' mortgage. Before considering these questions, —and they present the only questions in the case,—it will be necessary to state certain preliminary facts. It is agreed that Johnson was the fee-simple owner of the real estate in controversy when he executed the mortgage; also that the mortgage remained of record, and was unsatisfied, on December 24, 1898, when Paschke purchased the premises. The series of conveyances in his chain of title were all of record, and are as follows: A deed from Johnson to John P. Walker, dated October 30, 1895; a deed from John P. Walker to F. T. Walker, dated September 10, 1898; a deed from F. T. Walker and wife back to John P. Walker, dated November 17, 1898. Defendant Paschke purchased from John P. Walker, and his deed bears date December 21, 1898, but was not delivered until three days later. The record also showed the following transfers of the Johnson mortgage: An assignment from John P. Walker to John L. Cashel, trustee, dated November 27, 1897, and an assignment from John L. Cashel, trustee, to F. T. Walker, dated September 21, 1898. Under date of November 17, 1898, F. T. Walker, the record owner of the mortgage, executed a satisfaction thereof, which was delivered to the defendant Paschke when he purchased the premises on December 24th thereafter. Paschke relied entirely upon record title, and had no actual notice that plaintiffs either had or claimed any right or

interest in the mortgage in suit. The record showed that John P. Walker owned the land, and that F. T. Walker owned the mortgage. We now turn to the contention that Paschke has no title by virtue of his purchase. Appellants contend that the deed from F. T. Walker and wife to John P. Walker, defendants' grantor, is entirely void, and conveyed no title. So much of it as is important for the purposes of construction is as follows: "Know all men by these presents, that I, F. T. Walker, and Maggie J. Walker, his wife, of Sioux county, and state of Iowa, in consideration of the sum of one thousand (\$1,000) dollars in hand paid by John P. Walker, of Walsh county, North Dakota, do hereby quitclaim unto the said ———, all right, title, and interest in and to the following described premises," etc. The objection to this instrument is that it does not designate a grantee. If this is true, it is without validity and effect, for it is an undoubted rule of law that a deed of real estate, to be effective as a conveyance, must designate a grantee; otherwise no title passes. The designation of a grantee is just as necessary to the validity of the grant as the designation of the grantor and the description of the property. 9 Am. & Eng. Enc. L. 132, states the rule as follows: "The deed must designate the grantee; otherwise it is a nullity, and passes no title. If not named, the grantee should be so described as to be capable of being ascertained with reasonable certainty; and, if named, the name should be sufficient to identify the person intended, though it need not, as matter of law, be accurate in every respect." Numerous authorities have been cited by counsel in support of their construction of the deed under consideration, among which are *Vineyard v. O'Connor* (Tex. Sup.) 36 S. W. Rep. 424; *Bay v. Posner*, (Md.) 26 Atl. Rep. 1084; *Mardes v. Meyers* (Tex. Civ. App.) 28 S. W. Rep. 693; *Newton v. McKay*, 29 Mich. 1; *Hardin v. Hardin* (S. C.) 11 S. E. Rep. 102; *Allen v. Allen* (Minn.) 51 N. W. Rep. 473; *Allen v. Withrow*, 110 U. S. 119, 3 Sup. Ct. Rep. 517, 28 L. Ed. 90. These cases are in point only so far as they declare general rules of interpretation. In none of them was the deed being considered identical in language with that before us. It is a general rule, applicable to all written instruments, that courts, in construing them, will, when possible, adopt a construction which will give effect, rather than one which defeats them. This maxim of interpretation is embodied in section 5103, Rev. Codes. The Michigan court, in *Newton v. McKay*, supra,—a case quite similar to the case at bar,—uses this language: "It is undoubtedly true that, to constitute a valid conveyance, the grant must in some way distinguish the grantee from the rest of the world. But it is equally true that if, upon a view of the whole instrument, he is pointed out, even though the name of baptism is not given at all, the grant will not fail. The whole writing is always to be considered, and the intent will not be defeated by false English, or irregular arrangement, unless the defect is so serious as absolutely to preclude the ascertainment of the meaning of the parties through the means furnished by the whole document and such extrinsic aids as the law

permits. It is not indispensable that the name of the grantee, if given, should be inserted in the premises. If the instrument shows who he is, if it designates him, and so identifies him that there is no reasonable doubt respecting the party constituted grantee, it is not of vital consequence that the matter which establishes his identity is not in the common or best form, or in the usual or most appropriate position in the instrument." In the above case the grantor was named as party of the first part, and one Genereaux as party of the second part. The grantee's name did not appear in the granting clause. It was held that, inasmuch as no other name appeared in the instrument, Genereaux was sufficiently designated as grantee. The language which we have quoted from the opinion was expressly approved in *Vineyard v. O'Connor* (Tex. Sup.) 36 S. W. Rep. 424, and it states a generally accepted rule of construction. Tested by the foregoing, does the deed in question designate a grantee? We are clear that it does. It recites that the consideration was paid by John P. Walker. That fact alone raises a very strong, but perhaps not a conclusive, presumption that he was intended as grantee. But we do not rest our conclusion on this presumption. But three persons are named in the deed. The first two—F. T. Walker and Maggie Walker—are grantors. The other person named is John P. Walker. The deed, after reciting that the consideration is paid by John P. Walker, declares that the grant is "unto said —"; that is, to some person or persons theretofore named. The only person to whom it can possibly refer is John P. Walker, for the grantors could not convey to themselves, and no other persons are named. Through a clerical omission Walker's name was not repeated in the blank in the granting clause, but he had already been named, and, had the blank been filled, no other name than his could have been inserted. The language, as it stands, forbids it. Our conclusion is that the deed designates John P. Walker by name as grantee with entire certainty, and is, therefore, a valid instrument.

We will next consider whether the defendant is a good-faith purchaser in the sense that his title is protected against the lien of the mortgage in suit. It appears that the negotiations which resulted in the purchase of the premises by defendant extended through three days, and that Walker, the vendor, was at all times the moving party in the transaction. The several propositions for the sale of the property came from him. On the day prior to the consummation of the sale he executed and placed on record a deed to defendant Paschke, and provided a certified abstract of title showing the title as we have described it. This, together with a satisfaction of the mortgage in suit, was exhibited to Paschke to show that the title to the premises which he was about to purchase was good, and was unincumbered by the Johnson mortgage. The defendant, because of his ignorance of the English language, was not capable of examining the abstract himself, and so employed counsel to do so. After being advised that the title was good, and not before, he paid the purchase price, received his deed, and also the satisfaction of

the Johnson mortgage. It is entirely clear that he acted in good faith, and that he had no actual knowledge that plaintiffs were interested in the premises in any way, and that he relied upon the record title in making this purchase. Considerable evidence was introduced for the purpose of showing that the land was worth more than defendant paid for it. The conflict on this point we need not determine. It is unimportant. It is true that Walker was engaged in perpetrating a fraud, but it is entirely clear that defendant was not in collusion with him, and that he acted in good faith. Under such circumstances, the fact that he made a good bargain—if that is the fact—would not authorize us to deprive him of its fruits. See *Heyrock v. Surerus* 9 N. D. 28, 81 N. W. Rep. 36. Under this state of facts, which party to this litigation must bear the loss,—plaintiffs, who are the innocent purchasers of the notes secured by the mortgage, or defendant Paschke, who in good faith, and without actual knowledge of plaintiffs' rights, purchased the mortgaged premises? Both upon principles of equity and under the statutes of this state, plaintiffs must bear the loss, and this for the reason that by not taking and recording an assignment of the mortgage they made the commission of the fraud possible. This has been held in states where the recording of assignments was not compulsory. See *Bank v. Anderson*, 14 Ia. 544, in which the court, speaking through Wright, J., said: "A secret or clandestine assignment, whether by parol or upon the instrument itself, or by the transfer of the debt, and however honest the purpose, is liable to untold abuse. They ought, therefore, to be made a matter of public record. The spirit, if not the very letter, of our recording law requires it. Such a requirement can work no possible hardship, while the contrary rule can only be attended by evil, and that continually. Parties should not be permitted to leave their rights and interests in liens and real estate in such a condition as to injure those who are deceived by appearances without a record to guide them." This is upon the general principle "that, when one of two innocent persons must suffer by the wrongful act of a third person, he must suffer who left it in the power of such third person to do the wrong." *McClure v. Burris*, 16 Ia. 591; *Livermore v. Maxwell* (Iowa) 55 N. W. Rep. 37; *Williams v. Jackson*, 107 U. S. 478, 2 Sup. Ct. Rep. 814, 27 L. Ed. 529. And it is generally held that statutes which have for their purpose the better security and repose of titles may postpone one who voluntarily neglects to avail himself of the registry laws, which enables him to give notice to all the world of his claims to the claims of a subsequent purchaser who acted on the faith of the public record. *Kenyon v. Stewart*, 44 Pa. St. 179; *Jackson v. Lamphire*, 3 Pet. 288, 7 L. Ed. 679; *Insurance Co. v. Talbot*, 113 Ind. 373, 14 N. E. Rep. 586. Again, plaintiffs are under the ban of the statute as well as of judicial authority. Section 3594, Rev. Codes, provides that "every conveyance of real property, other than a lease for a term not ex-

ceeding one year, is void as against any subsequent purchaser or incumbrancer, including an assignee of a mortgage, lease or other conditional estate, of the same property, or any part thereof in good faith and for a valuable consideration, whose conveyance is first duly recorded." An assignment of a real estate mortgage is included in the term "conveyance" used in the section quoted, and is an instrument required to be placed on record. This section is a re-enactment of section 3293, Comp. Laws, and has been repeatedly construed by the Supreme Court of South Dakota, where it has continued in force, and held that an unrecorded assignment of a mortgage is void as to subsequent purchasers or incumbrancers of the mortgaged premises in good faith and for a valuable consideration whose conveyances are first recorded. In *Morrill v. Luce* (S. D.) 61 N. W. Rep. 43, an assignment had been executed, but not recorded. In *Merrill v. Hurley* (S. D.) 62 N. W. Rep. 958, there was merely a transfer of the notes, as in the case at bar. The same was true in *Pickford v. Peebles* (S. D.) 63 N. W. 779. In each case it was held that the failure of the purchaser of the notes to record an assignment of the mortgage defeated his right as against innocent purchasers, and such is the holding of all courts where a similar statute is in force. *Girardin v. Lampe* (Wis.) 16 N. W. Rep. 614. See cases cited in *Morrill v. Luce*, supra; also in *Windle v. Bonebrake* (C. C.) 23 Fed. Rep. 165. Plaintiffs neglected to take and record an assignment. Defendant purchased in good faith, and for a valuable consideration. It follows, therefore, both upon equitable principles and under section 3594, Rev. Codes, that plaintiffs cannot enforce their mortgage against the title he acquired by such purchase. The judgment of the District Court is affirmed. All concur.
(84 N. W. Rep. 350.)

JOHN J. CHILSON vs. W. F. HOUSTON.

Opinion filed October 29, 1900.

Deceit—False Representations—Question for Jury.

In an action to recover damages for a deceit practiced by the seller of a promissory note upon the purchaser thereof, consisting of false representations as to the financial condition of the maker of the note, which are alleged to have induced its purchase, the question as to whether the purchaser relied upon the false statements, and was induced thereby to purchase the note, is a question of fact to be determined by the jury.

Evidential Facts—Reliance Upon False Statements.

It is not necessary that the false statements and the acts of reliance thereon shall concur in point of time. It is sufficient if such false statements are the inducements causing a person to part with his property, and the length of time intervening between the time when the representations were made and the time when they were acted on is merely an evidential fact, to be considered by the jury in determining whether the false statements were relied upon.

Appeal from District Court, Richland County; *Lauder, J.*
 Action by John J. Chilson against W. F. Houston. Judgment for plaintiff. Defendant appeals.
 Affirmed.

F. W. Murphy and *Charles A. Tuttle*, for appellant.

Antecedent representations made by the vendor as an inducement to the buyer, but not forming a part of the contract when concluded, are not warranties. Benjamin on Sales, § 610; 2 Parsons on Contracts, 477; *Hopkins v. Tongueray*, 15 C. B. 130; *Halley v. Folsom*, 48 N. W. Rep. 219; *Sculley v. Bailey*, 1 H. & C. 405; *Bloss v. Kittridge*, 5 Vt. 28.

Freerks & Freerks, for respondent.

Under the evidence in this case the question of the right to rely, and of reliance by plaintiff on the false representations of the defendant in making the contract in question is one of fact and not of law. *Nash v. Minnesota Title Ins. Co.*, 159 Mass. 437, 34 N. E. Rep. 625; *Ingalls v. Miller*, 121 Ind. 188; *Christmas v. Frei*, 44 N. W. Rep. 329; *Hopkins v. Hawkeye Ins. Co.*, 57 Ia. 203; *Sim v. Pyle*, 84 Ill. 271; *Farr v. Peterson*, 91 Wis. 182. It will be presumed that the defrauded party acted in reliance upon the false representations when the contrary is not shown. Benjamin on Sales, §§ 382-390; Kerr on Fraud & Mistake, § 79; *Boyce v. Grundy*, 28 U. S. 210; *Connersville v. Wadleigh*, 41 Am. Dec. 214; §§ 3940-3942, Rev. Codes. This is not an action on contract of warranty but an action for deceit by which respondent was misled into making a disadvantageous contract. *Stanhope v. Steafford* 45 N. W. Rep. 403; *Phelps v. James*, 44 N. W. Rep. 543; *Andrews v. Jackson*, 37 L. R. A. 402; Benjamin on Sales, § 610; *Gustavson v. Rustemayer*, 70 Conn. 125, 39 L. R. A. 644; *Crane v. Elder*, 15 L. R. A. 795. Plaintiff was not bound to forget before the final trading all that had been stated to him six months before concerning the character of the note. "A lie six months old is quite as likely to mislead an innocent party to his damage as one hot from the liar's mouth." *Lindauer v. Hay*, 17 N. W. Rep. 98. A false affirmation, made by defendant with intent to defraud, whereby the plaintiff receives damage is ground for action, and it is not necessary that defendant should be benefited by the deceit or that he should collude with the person who is. *Pasley v. Freeman*, 2 Smith's Lead. Cas. 1; 3 Waite's Actions & Defenses, 452; *Crause v. Busaker*, 81 N. W. Rep. 406; *Bird v. Kleiner*, 41 Wis. 134; *Cotzhansen v. Simon*, 47 Wis. 473; *Lumber Co. v. Myhills*, 80 Wis. 541; *Beetle v. Anderson*, 98 Wis. 560. These are actions for damages for false and fraudulent representations inducing the making of contracts, and not contracts for breach of warranties, either embodied in or originally proven to form part of contracts. *Everton v. Miles*, 6 Johns. 139.

YOUNG, J. This action is to recover damages for a deceit alleged

to have been practiced by the defendant, whereby the plaintiff claims he was damaged. The complaint, in substance, alleges that on or about December 1, 1898, the plaintiff sold and deeded to the defendant a tract of land situated in Richland county, in this state, for and in consideration of the sum of \$1,228; that \$728 of the purchase price was paid to the Bank of Fairmount, pursuant to agreement between plaintiff and defendant, in cancellation of an indebtedness held by such bank against plaintiff; that, in payment of the balance due upon the purchase price of said land, the defendant sold and transferred to plaintiff a certain promissory note for \$500, executed by one W. T. Boutwell, and payable to the defendant, which note bore date October 19, 1897 and became due two years thereafter; that at the time of the sale of such note and prior thereto the defendant falsely and fraudulently represented to plaintiff that it was a good and collectible note, and falsely and fraudulently stated that the maker was solvent and worth at least \$7,000 in property, and that said note was perfectly good and would be paid promptly when due; that said statements and representations were wholly false, and known to be false by the defendant, and that the same were made for the purpose of deceiving the plaintiff as to the true character of said note and the financial condition of the maker; that plaintiff relied upon the representation so made as to the character of the note and solvency of the maker, and accepted the same for the balance of the purchase price of the land; that defendant was not acquainted with the maker of the note, and could not by the exercise of reasonable diligence ascertain its character, as defendant well knew; that the note was then and now is wholly worthless and uncollectible, all of which the defendant well knew; that the aforesaid statements and representations were made by the defendant to deceive the plaintiff and to induce him to accept said note, and that by such representations and statements the plaintiff was deceived and cheated, and induced to accept said note for the balance of the purchase price of his land. He laves his damage at \$500 and interest, and makes tender of the note to defendant. The defendant's answer admits the execution and delivery of the deed to him, and that he is the owner of the land. He also admits that he was the owner of the Boutwell note at the date alleged, and that he indorsed it to the plaintiff. All other allegations of the complaint are specifically denied. At the trial in the District Court the issues were submitted to a jury for determination, and a verdict was returned in favor of the plaintiff, assessing his damages at the sum of \$569. A motion for new trial was made and overruled. Thereafter judgment was entered. Defendant appeals from the judgment, and urges that the District Court erred in not granting his motion for new trial.

Counsel for defendant relies upon two alleged errors. The first is the denial of a motion for a directed verdict at the close of the case, which motion was upon the ground that the plaintiff had failed to prove facts sufficient to make out his cause of action. Counsel's

particular contention on this point is that under the facts as they appear in evidence the representations which plaintiff testifies were made could not, as matter of law, have been the inducement prompting plaintiff to part with his property, for the reason, as he claims, that they were remote in point of time, and wholly disconnected with the actual sale and transfer of the note in question. Before considering the question presented in the foregoing proposition, it will be necessary to set out some of the facts shown by the evidence: The defendant was interested in the Bank of White Rock, of White Rock, S. D. His home, however, was at River Falls, Wis., and he spent only a portion of his time at White Rock. Newell Powell, the cashier of the Bank of White Rock, was his son-in-law. The debt of \$728 which plaintiff owed to the Bank of Fairmount was secured by a mortgage on the land in question. Plaintiff left word with Powell that he wanted either to sell his land or borrow money on it. Shortly afterwards, and about May 1, 1898, the defendant called on the plaintiff in reference to the matter. All of the witnesses testify that defendant declined to make the loan requested, for the reason, as then stated, that he did not have the money. The witnesses also agree that he offered to buy the land, and in payment therefor to pay or assume the amount due the Bank of Fairmount, and to give plaintiff the Boutwell note, which he then had with him, and exhibited to plaintiff. Plaintiff declined the offer, and no sale either of the land or note was then made, or until a much later date. It was at this first meeting that the alleged false statements were made, upon which plaintiff relies for a recovery. It is not necessary to narrate the particular statements made by the defendant to plaintiff at that time concerning the financial standing of Boutwell, the maker of the note. The evidence is conflicting on this point, but it is not contended that such statements were not material, or that the jury were not justified by the evidence in finding that they were made as alleged. Defendant's sole contention is that they were too remote, and were not connected with the sale subsequently made. No further negotiations were had between the parties until early in the following December, when they met, and defendant again inquired whether plaintiff would take the Boutwell note for his land, and the offer was again declined by plaintiff. Defendant then stated that he was going to Wisconsin, and might possibly secure money there to make the loan which plaintiff desired, and that plaintiff could leave word with Powell as to what he wanted to do. Within a few days plaintiff informed Powell that he still wished to secure the loan from defendant. This was communicated to defendant, and he replied that he would make it. On the next day, however, and before the loan was completed, plaintiff informed the defendant, through Powell, that he had decided to take the Boutwell note for his land. The note was at once sent to plaintiff, and the latter executed and delivered the deed of his land. No statement of any kind was made by the defendant to plaintiff concerning Boutwell's financial standing subsequent to their first

negotiations on the 1st of the preceding May. It appears that in the intervening time plaintiff had not thought seriously of accepting defendant's proposition. Boutwell is of Indian descent, and lived on the White Earth Indian reservation, in Minnesota, when the note in question was executed, and for several years prior to that time. Before that he lived in Wisconsin. The defendant owned this note, and also another for the same amount. He personally secured the execution of these notes by Boutwell at White Earth. They were renewals of an old claim which defendant had held against Boutwell for years. How old it was is not certain, but he admitted it was from 7 to 17 years old when renewed in these notes. The jury were justified in finding that the note was worthless. Defendant knew Boutwell, both in Wisconsin and Minnesota. The plaintiff had no information concerning him, save that acquired from the defendant when the latter first proposed the sale of the note. Upon this state of facts the trial court was asked to declare, as a proposition of law, that the statements made by defendant in May as to Boutwell's financial standing were wholly disconnected with the subsequent sale of the note, and could not legally be relied upon by the plaintiff, or serve as inducement to him to make such purchase in December. This the trial court declined to do, and we think properly. The question which is decisive on this point is this: Did plaintiff rely and act upon the false statements to his damage? Whether he relied upon them is not a question of law, but a question of fact, purely. The question is not whether the false statements should have induced plaintiff to part with his property, but is this: Did they induce him to do so? This is always for the jury, where there is substantial evidence warranting the conclusion that the false statements were relied upon. We know of no principle of law which requires that the false statements and the reliance thereon shall concur in point of time. *Allen v. Truesdell*, 135 Mass. 75; *Lindauer v. Hay* (Iowa) 17 N. W. Rep. 98. As was said in *Morris v. People*, 4 Col. App. 136, 35 Pac. Rep. 188: "It is simply essential that the party make a false statement, and that the proof show that on account of it the goods were transferred. In other words, the misrepresentation must be the operative cause of the transfer." The remoteness or nearness of the misrepresentations to the sale go to their weight as evidential facts on the question whether they were the inducements to the sale. Of course, when there is no evidence that the false statements were actually relied upon, the court should direct a verdict, but that is not this case. The evidence shows that the plaintiff parted with his land for this note. He supposed he was getting the value of his equity, in the form of a good and collectible note. He knew of its value only through defendant's statements: In estimating its value he had nothing else to rely upon, and under these conditions it is absurd to say that the jury were not justified in concluding that he did rely upon what defendant had told him in May when he took the note in December. As holding that the question whether reliance was

placed upon the false statements is for the jury, see *Nash v. Trust Co.*, 159 Mass. 437, 34 N. E. Rep. 625; *Ingalls v. Miller*, 121 Ind. 188, 22 N. E. Rep. 995; *Christmas v. Frei* (Mich.) 44 N. W. Rep. 329; *Hopkins v. Insurance Co.*, 57 Ia. 203, 10 N. W. Rep. 605; *Sim v. Pyle*, 84 Ill. 271; *Farr v. Peterson*, 91 Wis. 182, 64 N. W. Rep. 863. For authorities in support of the proposition that false statements of fact, such as were made in this case constitute actionable deceit, and that damages directly resulting therefrom may be recovered, see *Andrews v. Jackson*, 168 Mass. 266, 47 N. E. Rep. 412, 37 L. R. A. 402; *Crane v. Elder* (Kan. Sup.) 29 Pac. Rep. 151, 15 L. R. A. 795; *Gustafson v. Rustemeyer*, 70 Conn. 125, 39 Atl. Rep. 104, 39 L. R. A. 644.

Counsel, while conceding that the evidence shows Boutwell's insolvency at the time the note was actually transferred, contends that it does not show he was insolvent when the representations were made in May. There is respectable authority holding that, where false statements have been made for the purpose of obtaining property from another, every step thereafter taken in the transaction is in itself a repetition of the falsehood. *State v. House*, 55 Ia. 466, 8 N. W. Rep. 307. So, also, it is held that where untrue statements have been made through mistake, and the person making them thereafter acquires a knowledge of their falsity, and before they are acted on, his mere silence gives to them a fraudulent character. *Porter v. Beattie*, 88 Wis. 22, 59 N. W. Rep. 499. In the case at bar, however, it is not necessary to resort to either of the above rules; for there is, we think, abundant evidence to show that Boutwell was insolvent, not only when the sale was actually consummated, but also in the previous May, when the representations were first made.

In the trial of the case, plaintiff's counsel in his closing argument to the jury, stated that plaintiff had rescinded the contract and made an offer to return the note. This was excepted to, and is assigned as prejudicial error. The offer was unnecessary and improper; for plaintiff's right to recover damages was based, not upon a rescission of the contract, but upon an affirmation of it, and we can readily see how a statement of this character might be prejudicial under some conditions. Counsel for plaintiff mistakenly assumed that it was necessary to return the note in order to recover damages for the deceit; for he not only made the statement complained of, but in his complaint made a specific offer and tender of the note to the defendant. The jury were not misled, however, for the court thereafter specifically instructed them that there had been no rescission of the contract, and, further, that if they found for the plaintiff his measure of damages would be the difference between what the note would have been worth had it been as represented, and what it was in fact worth at the time it was transferred. These instructions, we think, sufficiently corrected and cured counsel's statement. The motion for new trial was properly overruled. The judgment of the District court is affirmed. All concur.

(84 N. W. Rep. 354.)

STINA M. OLSON vs. M. J. O'CONNOR, *et al.*

Opinion filed November 3, 1900.

Evidence of Ownership—Opinion of Witness.

It is not error, in the trial of an action to recover damages for the conversion of property, to permit witnesses who are personally familiar with the facts upon which the ownership of such property is based to testify directly to the ownership of the same, as a fact. The rule is otherwise where the facts constituting ownership are complex, or are not all within the knowledge of the witnesses, so that the answer as to ownership involves the opinion or conclusion of the witnesses.

Facts on Which Conclusion is Based May Be Shown.

Ordinarily a statement as to the ownership of property is a statement of fact, and in such cases a direct answer is admissible. Where, however, it is a mixed question of law and fact, and a witness has answered against the objection that the question calls for a conclusion, the error may be cured by a disclosure of the facts upon which the conclusion is based, either in direct or cross examination.

Fraudulent Conveyance—Homestead—Married Woman's Separate Property.

The plaintiff, who is a married woman, sues to recover the value of a quantity of grain taken from her by the defendants as the property of her husband. It was grown on land to which she had title. Defendants requested the court to instruct the jury that if they found that her husband had transferred the title of the land to her to defraud his creditors, and she knew that fact, the transfer was void. *Held*, that the instruction was properly refused, inasmuch as it appeared that the land was a homestead.

Unintelligible Instructions.

A certain instruction examined, and *held* not vulnerable to the objection that it is unintelligible and erroneous.

Husband When Not Owner of Crops on Wife's Land.

The fact that a husband gratuitously devotes his time and skill to the management of his wife's land and the conduct of her farming operations does not operate to vest in him the title to the crops grown thereon.

Wife Owns Crops Grown on Her Own Land.

Both the plaintiff and her husband testified that she owned the grain which was taken by defendants, and stated the facts upon which her ownership rested, namely, that she owned the land, and raised it in her own right. *Held*, that the court did not err in refusing to direct a verdict for the defendants on the ground that the evidence showed conclusively that plaintiff was not the owner.

Appeal from District Court, Grand Forks County; *Fisk*, J.

Action by Stina M. Olson against M. J. O'Connor, sheriff, and Andy Jones. Verdict for plaintiff. From an order granting a new trial, plaintiff appeals.

Reversed.

John A. Sorley, for appellant.

When the sheriff seized the property in dispute he took it from the possession of plaintiff, who told him that it was her property. He therefore cannot justify his seizure under claim and delivery process against her husband. *Welter v. Jacobson*, 7 N. D. 32, 73 N. W. Rep. 65; § § 2766-2767, Rev. Codes. The common law presumption does not prevail that when property is found in the possession of a husband and wife that it is the property of the husband. *Bookman v. Clarke*, 79 N. W. Rep. 159; *Oberfelder v. Kavanaugh*, 45 N. W. Rep. 471. The separate property of a married woman is not liable for her husband's debts because he gratuitously devoted his time and skill to the management of it, and because part of it had been accumulated through the labor denoted by him. *Deere, Wells & Co. v. Brown*, 79 N. W. Rep. 59; *Carn v. Rogers*, 8 N. W. Rep. 629; *Webster v. Hildreth*, 33 Vt. 457; *Burleigh v. Coffin*, 22 N. H. 118; *Feller v. Alden*, 23 Wis. 301; *Hoagh v. Martin*, 45 N. W. Rep. 1058; *Russell v. Long*, 3 N. W. Rep. 75; *Lewis v. John*, 24 Cal. 98; *Heartz v. Klieubhammer*, 40 N. W. Rep. 826; *Hosfelt v. Dill*, 10 N. W. Rep. 781; *Duncan v. Kohler*, 35 N. W. Rep. 594.

George A. Bangs, for respondents.

Where ownership of personal property, as in this case, is a material and ultimate fact to be determined, and is controverted upon the trial, the witness should testify to the principal facts within his knowledge which bear upon the question of ownership, and not give his mere opinion and conclusion thereon. *Brown v. Bank*, 42 Pac. Rep. 593; *Erickson v. Sophy*, 71 N. W. Rep. 758; *Farmer v. Brohan*, 71 N. W. Rep. 246; *Watrous v. Morrison*, 14 South. Rep. 805; *Hite v. Stimmel*, 25 Pac. Rep. 852; *Smith v. Cohn*, 32 Atl. Rep. 564; *Montgomery v. Martin*, 62 N. W. Rep. 578; *Nicolay v. Unger*, 80 N. Y. 54; *Newins v. Rose*, 33 N. Y. Supp. 1131. Plaintiff claimed title by virtue of her ownership of the land. Plaintiff's husband owned the land when the mortgage, under which defendants justify, was given. The land was deeded to plaintiff to avoid a judgment lien, with the knowledge of plaintiff, and no consideration used in the transfer. The burden was on plaintiff to show that her husband retained sufficient property to pay his debts, else the transfer was void as to defendants. *Haufman v. Nolle*, 29 S. W. Rep. 1006; *Ware v. Purdy*, 60 N. W. Rep. 526; *Waite, Fraudulent Conveyances*, § 412; *Booher v. Worrill*, 57 Ga. 235; *Redmon v. Chandley*, 26 S. E. Rep. 255.

YOUNG, J. Action in conversion to recover the value of a quantity of grain. Plaintiff claims as owner, and alleges that the grain in controversy was raised by her in 1896, and upon land of which she was the owner. Defendants admit the taking, and quantity and value of the grain, but allege as a complete defense that the same was not the property of the plaintiff, but was owned by Albert G. Olson, plaintiff's husband, and that the same was taken by the defendant O'Connor, as sheriff of Grand Forks county, under and

by virtue of certain claim and delivery proceedings which were based upon a chattel mortgage thereon executed and delivered by the said Albert G. Olson, the defendant in said claim and delivery action, to Andy Jones, the plaintiff therein. Jones is joined as defendant in this action. Thus it will be seen that the case turns on the ownership of the grain in controversy. It is conceded that, if plaintiff's husband was the owner, then the taking by the defendants was lawful, and plaintiff cannot recover; and, on the other hand, if plaintiff was the owner, such taking was unlawful, and plaintiff is entitled to recover. The case was tried to a jury, and a verdict was returned in favor of plaintiff. The defendants moved for a new trial, and this was granted. Plaintiff appeals from the order granting a new trial, and assigns the same as error. The motion was based entirely upon errors of law occurring at the trial. Accordingly the order sustaining the motion must stand or fall upon the result of our review of the alleged errors. There is nothing in the record to indicate what particular grounds the court relied upon in granting the motion. We will, however, consider all that appear of substantial merit.

Counsel for respondents in his brief submits five propositions in support of the order granting a new trial. They are as follows: (1) Error in the admission of certain testimony; (2) error in the failure to charge, amounting to a misdirection; (3) refusing to charge as requested; (4) error in the charge; (5) refusal to direct a verdict. A brief statement of facts is necessary to a consideration of these alleged errors. The grain in controversy was grown in 1896 upon a quarter section of land, which was then, and for five years prior thereto had been, occupied by the plaintiff and her husband as their homestead. The title to the land was in the plaintiff at all times since it was purchased. It was purchased with money derived from the sale of their former homestead. The title to this former homestead was in plaintiff when sold, and for four years prior thereto. Originally the title to it was in her husband. It appears that he transferred the title to her about the time a certain judgment was rendered against him, in favor of the Sandwich Manufacturing Company, in the District Court of Grand Forks county. On June 23, 1896, the defendant Jones secured the issuance of an execution on said judgment, and in company with a deputy sheriff visited plaintiff's residence and took steps towards making a levy. No levy was made, however. Instead, the defendant Jones and the deputy sheriff induced plaintiff's husband to accompany them to Grand Forks, and there, at the solicitation of defendant Jones, Olson executed the note and chattel mortgage in favor of Jones, which have been referred to, as the basis of the claim and delivery proceedings, covering the crop then growing upon his wife's land. The plaintiff was not present when the mortgage was executed. Neither did she authorize or ratify its execution. Olson testifies that he protested against giving the mortgage on the ground that the property was his wife's, and this is corroborated by the

scrivener who drew the chattel mortgage. Jones himself says that he had difficulty in getting him to sign a mortgage for so large an amount, and that Olson stated that the real estate was not his, but belonged to his wife, but did not say the chattel property was his wife's, and did say that the crop was his. This latter statement is opposed to the testimony of both Olson and the scrivener. The fact is not disputed that the plaintiff had the apparent legal title to the land upon which the grain in question was grown. It is also one of the undisputed facts in the case that the plaintiff and her husband, with their children, resided on this farm at all times here in question, and that the grain involved in this action was grown upon this land. As to the ownership of the grain, plaintiff testified that she owned the land, and that the grain was raised under her direction and control; that the actual labor was done by her husband, their son, and hired men; that most of it was done by her husband, who generally marketed the grain and brought her the money; that he usually made the purchases for the farm; that all disbursements were made by her, directly or through her husband, acting for her and at her request; that this was also the general method upon which she had conducted her farming operations for the nine years that she had title to the lands upon which they lived. Olson's testimony is to the same effect.

With these preliminary statements, we turn to the consideration of the errors upon which respondents rely to support the order granting a new trial. The first relates to rulings admitting answers to the following questions propounded to plaintiff in redirect examination: "(1) Q. For whom did Albert Olson work in 1896? (2) Then you are controlling and running the farm? (3) Q. Whose grain was it, raised there in 1896?" And this question asked of Albert G. Olson in his direct examination: (4) Q. You may state who was the owner of the crop?" The objection to each question was that it was incompetent and called for the conclusion of the witness, and counsel contends that the overruling of such objections was error. The first two of the above questions so clearly call for statements of facts, and not conclusions, that they do not require extended notice. Plaintiff's answer that her husband worked for her, and that she ran the farm, was a statement of fact, purely, and in no particular rested upon her opinion or inference. The other two questions call for a direct statement as to the ownership of the grain in controversy. Counsel's contention is that the answers to these questions were merely expressions of the opinions and conclusions of the witnesses, and were therefore objectionable, and he urges the governing rule that "when ownership is a material and ultimate fact to be determined in an action, and is controverted upon the trial, the witnesses should testify to the principal facts within their knowledge which bear upon such question, and not give their mere opinions and conclusions thereon." The rule as thus stated by the Court of Appeals of Kansas in *Brown v. Bank*, 42 Pac. Rep. 593, is in harmony with the current of authority. *Farmer v. Brokaw*,

(Iowa) 71 N. W. Rep. 246; *Simpson v. Smith*, 27 Kan. 565; *Hite v. Stimmel* (Kan. Sup.) 25 Pac. Rep. 852; *Montgomery v. Martin* (Mich.) 62 N. W. Rep. 578; *Bahe v. Baker*, 44 Ill. App. 578; *Nicolay v. Unger*, 80 N. Y. 54. Undoubtedly the foregoing authorities correctly state the rule where the answer of a witness as to ownership involves his construction of facts or his conclusion as to what they establish. In such cases it is erroneous to permit witnesses to testify to the ultimate fact of ownership, and by so doing compel the jury to return a verdict upon the opinions and conclusions of the witnesses, instead of the primary facts upon which ownership is based. But it is also the unanimous voice of these authorities that where the answer as to ownership is direct, but is subsequently qualified by a statement of the facts relative to it, or tending to show such ownership, and discloses the facts upon which the answer is based, the error is cured, and is not ground for reversal. The reason for this, as stated in *Nicolay v. Unger*, *supra*, is that "defendants would receive all the advantage which would flow from the evidence given in regard to what transpired between the parties, and it would not add to its weight or increase its effect by proof of the conclusion of the witness." *Steele v. Benham*, 84 N. Y. 639; *Miller v. Railway Co.*, 71 N. Y. 380. So if it was conceded that the questions objected to in the case at bar did in fact call for the conclusions of the witnesses, and not statements of fact, purely, we nevertheless would be compelled to hold that the error was not material, and furnished no ground for granting the motion; for it appears in the record that counsel for defendants by a prolonged and searching cross-examination developed every fact which could in any way bear upon the question of ownership, and plaintiff's claim thereto. But we are agreed that in this case, under the facts as they appear, these questions did not call for an opinion, but a statement of a fact, simply, and therefore come under the rule that where the question involves a fact clearly within the knowledge of the witness, and not the expression of an opinion upon facts proven, such question is admissible. *DeWolfe v. Williams*, 69 N. Y. 621; *Knapp v. Smith*, 27 N. Y. 277; *Sweet v. Tuttle*, 14 N. Y. 465; *Davis v. Peck*, 54 Barb. 425. In *DeWolfe v. Williams*, *supra*, the question objected to was this: "Whose was the property in the house at 516 Pacific street?" This was objected to "as a question of law." The objection was overruled, and witness answered that it was hers. The court held "that the question and answer were proper; that the title to property was ordinarily a simple fact, to which a witness having the requisite knowledge could testify to directly." In *Davis v. Peck*, 54 Barb. 425, the question involved was whether the plaintiff made a certain loan as receiver or individually. It was held that it was not error to permit him to answer in which capacity he acted. The court said that the inquiry embodied a fact within the knowledge of the plaintiff, and did not require the expression of an opinion on the law of the case. He, above all others, was in a position to know what the fact was. In *Knapp v. Smith*,

supra, which is in many respects similar to the case at bar, a wife, who was the plaintiff in the action, was asked this question: "For whom did your husband do what business he did after you took the deed?" This was objected to as calling for a legal conclusion. Her answer was: "I expected he was doing it for me." The court said: "Legal considerations may, no doubt be involved in a question of agency. But prima facie the inquiry whether a person engaged in a particular employment was doing business on his own behalf, or as the agent of another, involves only the question of fact whether he had been employed by that other person, and it is therefore a competent question to put to such person." In the case now under consideration the question of ownership was not a mixed question of law and fact. It rested upon two precedent facts, namely, that plaintiff owned the land, and that she herself produced the grain in controversy on said land. These facts were peculiarly within the knowledge of both the plaintiff and her husband, and when they testified that the plaintiff was the owner of the grain they did not give a conclusion or an opinion, but stated a fact within their knowledge. If these precedent facts were true, it conclusively followed that she owned the grain, and her ownership was a fact, and it was competent for her to so testify, subject to cross-examination, of course, as to the existence of the precedent facts. This case is not to be confounded with those where the answer of a witness does in fact involve the expression of an opinion or his conclusion or legal inferences. In such cases the objection urged would be proper. But in this case both witnesses knew who owned the land and who raised the crop, and could state from their own knowledge therefrom who was the owner of it; and this not as the statement of an opinion, but of a fact. And the test always is whether the answer calls for an opinion or a fact. The peculiar facts of each case must determine the rule to be applied. The one most generally applicable in actions for conversion is that stated in Abb. Tr. Ev. 623. It is this: "A witness may testify, directly, in the first instance, who owned the property, if he can do so positively, and not as mere opinion." The court did not err in admitting the evidence complained of.

The specification of errors as to the instructions may be treated under two heads: The first, failure to charge as requested; the second, error in the instructions given. Counsel for defendants asked the court to instruct the jury that if they found that the transfer of the land by Albert G. Olson to his wife, the plaintiff herein, was made to defeat the claim of the defendant, and that plaintiff had knowledge of such intent, then such transfer was void and conveyed no rights to her, and the defendant would in that event stand in the same position towards the grain in controversy as though no transfer had been made. Other requests similar in nature were asked. All of them were refused. And we are entirely clear that the court properly refused them, for there are no facts in the case calling for such instructions. In the first place, there never was a transfer of the title of the land on which this crop was grown from

Albert G. Olson to the plaintiff. Olson never had title to it. It belonged to her from the date it was purchased. The only transfer made was nine years before. But that was his homestead, and was exempt. It was property to which the lien of the judgment did not attach, and was beyond the reach of an execution issued thereon. It was not possible to defraud his creditors by transferring the title to his wife, for it was property to which they could not look for the collection of the claims. For these reasons, even in a proper case the transfer was not subject to attack. Counsel does not contend to the contrary. In fact, it is conceded that, so far as the actual title to the land is concerned, it is not vulnerable to assault because made in fraud of creditors; but, counsel contend that such transfer is void for the reason and to the extent that it affects the title to crops thereafter grown on such land, because to that extent, he says, it tends to hinder and delay creditors in the collection of their debts. Briefly, counsel's position is this: If Olson had not transferred the title to the land, he, and not plaintiff, would have been the owner of the grain subsequently grown thereon. As a statement of fact, this is true; but as a ground for claiming that the transfer of the land was in fraud of creditors, it is not sound. Its fallacy lies in falsely assuming that the transfer of the title then and there conveyed something of value other than the land itself, namely, the crops subsequently grown. Of course, Olson transferred to plaintiff nothing more than he had then, and that was the land itself. At that time these subsequent crops had no existence of value. By transferring the land to his wife he did not transfer crops afterwards grown. They were subsequent creations, which plaintiff claims she herself produced. Counsel's contention is equivalent to saying that under proper conditions property may be transferred by a debtor, and such transfer shall not be subject to attack as a fraud upon creditors, and in the same breadth declaring that the person obtaining it must not use it or profit by it. This proposition has no support in any principle known to the courts. The instruction requested was properly refused.

The following instruction given by the court was excepted to by defendants, and specified as error in the motion for new trial: "If from all the evidence in the case you believe that the plaintiff and her husband conspired together to defeat the payment of this mortgage by claiming that said property belonged to the plaintiff, when in truth and in fact it belonged to her husband, and that he in fact cultivated said land and raised said crop for his own use and benefit, and that he worked said land and raised said crop in his wife's name in pursuance of such collusive arrangement, then in that event your verdict should be for the defendant." Respondents' counsel criticises this portion of the charge as unintelligible, and also claims that it is erroneous. We do not think it is open to either objection. It was applicable to the evidence before the jury for consideration, and states the law entirely favorable to the defendants. If open to criticism at all, it is that it is too favorable to

them. By this instruction the jury were required to find for the defendants if they should find that plaintiff's husband cultivated the land and raised the crop for his own use and benefit. To reach this conclusion, it was necessary for them to find that the claim of the plaintiff and her husband, that the crop was hers was false and collusive, and the court correctly states that this was essential before a verdict could be found for defendants. Inasmuch as the plaintiff owned the land and was entitled to its use, the crops, presumptively, were hers. The right of her husband to crop the land, if it existed, must of necessity have been founded on a transfer of such right to him by the plaintiff in some form which the law would recognize as having that effect. The law applicable would have been more correctly stated if the court had instructed the jury that if they found from the evidence that plaintiff's husband had obtained from plaintiff the right to use the land for the cropping season of 1896, and had produced the crop thereon for his own benefit and on his own account, then he, and not the plaintiff, was the owner thereof, and the verdict must be for the defendants. The failure of the court to require the jury to find that Olson had a right to the use of the land for cropping purposes rendered the charge extremely favorable to the defendants.

The remaining error relied upon is the refusal of the court to direct a verdict for defendants. The ground of the motion was that plaintiff had failed to show that she was the owner of the grain, or that she was either in possession or entitled to possession. There are two particulars in which defendants claim that plaintiff failed. The first is that the evidence shows conclusively that she was not the owner of the land. This feature of the motion is based wholly upon the theory that the transfer of title by her husband was in fraud of creditors, and therefore void. This, as we have seen, is not tenable, and requires no further notice. The second ground is that the evidence shows conclusively that she did not cultivate the land and raise the crop. We do not so read the evidence. Both plaintiff and her husband testify that the crop was grown under her direction and control. It is true that plaintiff stated that her husband attended to practically all business details, and it appears, also, that he did most of the work on the farm, without compensation other than his living. But the mere fact that he devoted his labor and time to producing the crop, and did this gratuitously, has no legal efficacy to vest the title of such crop in him. The existence of the marriage relation did not remove the right to manage and control her own property which she had as a single woman. Section 2767, Rev. Codes, provides that "the wife after marriage has with respect to property, contracts and torts the same capacity and rights and is subject to the same liabilities as before marriage. * * *". It is now so well settled that the gratuitous contribution of a husband's time and skill to the management of his wife's property creates no title to its profits or increase in him, that the question is no longer debatable. See *Hartz v. Klinkham-*

mer (Minn.) 40 N. W. Rep. 826; *Duncan v. Kohler* (Minn.) 34 N. W. Rep. 594, and *Deere, Wells & Co. v. Bonne* (Iowa) 79 N. W. Rep. 59, and numerous authorities cited. It is clear that the trial court properly refused to direct a verdict for the defendants, and to have done so would have constituted reversible error. Our review of the record upon which the motion was based shows no error. It should have been denied. The District Court is accordingly directed to enter an order vacating its order granting a new trial. All concur.

(84 N. W. Rep. 359.)

ANNIE LOKKEN *vs.* W. G. MILLER, *et al.*

Opinion filed November 9, 1900.

Payment—Burden of Proof.

The plea of payment in an answer to a complaint for a liquidated demand confesses the cause of action, and casts the burden upon the defendant to sustain such plea.

What Constitutes Payment.

An obligation to pay money may, by agreement to that effect between the debtor and creditor, be discharged by the delivery to and acceptance by the creditor of the obligation of a third person, but the mere delivery of such an obligation by a stranger to the transaction, and without such agreement, does not have the effect of discharging the original obligation.

Appeal from District Court, Richland County; *Glaspel, J.*
Action by Annie Lokken against W. G. Miller and W. J. Miller, partners as Miller Bros. Verdict for plaintiff. Defendants appeal. Affirmed.

W. E. Purcell, for appellants.

Defendants' motion, made at the close of plaintiff's case, to direct a verdict in their favor, should have been granted because there was no evidence of a demand before suit for the money claimed. 5 Am. & Eng. Enc. L. 521; *Roody v. Ryler*, 24 Vt. 660. Where the contract in suit does not provide for the time of performance, demand and refusal must be alleged and proved. *Worley v. Mourning*, 4 Ky. 254; *Babb v. Babb*, 89 Ind. 281; *Powers v. Basford*, 19 How. Prac. 320. Plaintiff's objections to exhibits offered in evidence were too general to prove available. *Kolka v. Jones*, 6 N. D. 480; *Plano Mfg. Co. v. Persons*, 81 N. W. Rep. 897. Even valid objections made after the witness has answered must be overruled because it will be presumed that counsel waited for the answer to see whether it was favorable or unfavorable to him, a practice that cannot be tolerated. *Way v. Johnson*, 5 S. D. 237; *Vermillion Well Co. v. City*, 6 S. D. 467. It was prejudicial error in the conduct of the trial for plaintiff's counsel, in argument to the jury, to state that "individuals do not have fidelity bonds to protect them

from defalcations of their agents and elevator companies do have such bonds." *Lindsay v. Pettigrew*, 3 S. D. 197; *Brown v. Swinford*, 44 Wis. 282; *State v. McGahey*, 3 N. D. 293.

Freerks & Freerks, for respondent.

The defendants are liable for, and bound by the acts and statements of their agent in connection with the subject matter of his employment, although these were intended to defraud them as well as the plaintiff. *Mecham on Agency*, § 739; *Reynolds v. Witte*, 30 Am. Rep. 678; *Rhoda v. Annis*, 46 Am. Rep. 356. One who employs an agent or attorney should lose by his fraudulent or illegal act in preference to an innocent third party. *North River Bank v. Aymer*, 3 Hill. 262; *Mundorf v. Wickersham*, 63 Penn. 87; *The Monte Allegro*, 22 U. S. 644, 6 L. Ed. 181; *Baltimore Trust & Gas Co. v. Hambleton*, 40 L. R. A. 216. The record shows that a demand was in fact made before suit. As to the language used by plaintiff's counsel in argument, the court instructed the jury to disregard the same. This cured the error if any. *State v. McGahey*, 3 N. D. 293, 55 N. W. Rep. 753.

YOUNG, J. The defendant is a co-partnership. In 1898 it operated a line of public elevators in this state. One H. H. Hanson had charge of its elevator at Christine, and also of defendant's business at that point in buying and shipping grain. This action is to recover the sum of \$150 and interest, as due and unpaid, for 200 bushels of wheat sold and delivered to defendant by plaintiff in the month of February, 1898, at its elevator at Christine, at an agreed price of 75 cents per bushel, no part of which sum, plaintiff alleges, has been paid. The answer sets up the defense of payment, and that defense only. By this plea the issues of fact for trial were narrowed to the single issue of payment, and as to that the defendant had the burden of showing by competent evidence the fact that he had discharged the indebtedness, which is admitted by his plea of payment. On the proposition that pleading payment of a liquidated demand confesses the cause of action, and dispenses with the necessity of plaintiff proving his cause of action, and casts the burden of proving the payment so pleaded on the defendant, see *Caulfield v. Sanders*, 17 Cal. 569. In *Mohr v. Barnes*, 4 Col. 351, the court said: "The effect of the plea is to admit the original liability, and the burden of its discharge is assumed by the defendant." See, also, 16 Am. & Eng. Enc. Pl. & Prac. 168, and cases cited. The trial in the District Court resulted in a verdict for plaintiff for the amount prayed for in her complaint. Defendant made a motion for a new trial. This was denied, and the appeal is from the order overruling such motion. The motion was based entirely upon alleged errors of law occurring at the trial. All of these alleged errors, some 30 in number, are urged on this appeal as ground for reversing the order of the District Court. Upon the record pre-

sented we find it unnecessary to review any of the errors specified. No evidence was introduced by defendant in support of his plea of payment, and none of the errors complained of relate to the exclusion of evidence upon that issue. Plainly, plaintiff was entitled to a verdict, and there was nothing for the jury to determine. Under these circumstances we will not review the numerous rulings of which appellant complains, for, whatever conclusions we might reach as to their correctness, we would be compelled in each instance to hold that no prejudice followed. There is no evidence that defendant, or any one on its behalf, has paid plaintiff for the wheat in money. But it is the contention of appellant's counsel that the obligation of defendant to pay for the grain purchased was discharged by the execution and delivery to plaintiff of a personal duebill by Hanson for the amount due for the wheat. Hanson was a witness for the defendant. It appears that at the time he purchased this grain in question he was short in his accounts with his employer, and very soon thereafter was discharged. He testified that subsequent to his discharge, and about one month after the sale and delivery of the wheat, he executed and delivered to plaintiff his personal obligation for the amount due her for the wheat, in the form of a duebill. Counsel's position is that this presented a question of fact for the jury to pass upon under defendant's allegation of payment. We do not think so. Conceding that Hanson's statements are entirely true, did the delivery of the duebill have the effect of extinguishing defendant's admitted obligation to pay for the wheat? We are clear that it did not. It is true, a creditor, by agreement with his debtor, may take the note or obligation of a third person in payment of a debt in lieu of money. But the taking of such obligation is not payment unless so agreed (*Waydell v. Luer*, 3 Denio, 410); and where the obligation of a third person is taken for a precedent debt, as in the case at bar, prima facie it is no discharge of the original debt (*Ford v. Mitchell*, 15 Wis. 304, and cases cited). There is no evidence whatever of an agreement between the plaintiff and defendant touching the matter of the duebill. It appears to have been given by Hanson in furtherance of purposes of his own, and not connected in any way with any agreement between the debtor and plaintiff. Under these circumstances the delivery of the duebill by Hanson was the act of a stranger, and his agreement to pay was without consideration, and was without effect upon the existing obligation of the defendant to pay for the wheat purchased from plaintiff. The order overruling the motion for new trial is affirmed. All concur.

(84 N. W. Rep. 368.)

DAVID A. GREGG vs. CHARLES A. BALDWIN.

Opinion filed November 12, 1900.

Notice to Agent—Effect on Principal.

To charge a principal with knowledge or notice on the part of his agent, which said knowledge or notice came to the agent prior to his employment as such agent, it must appear that such knowledge or notice was present in the mind of the agent when he acted for the principal in the transaction in which the principal is sought to be charged with such knowledge or notice.

Appeal from District Court, Grand Forks County; *Fisk, J.*
Action by David A. Gregg against Charles A. Baldwin. Judgment for defendant, and plaintiff appeals.
Modified.

Cochrane & Corliss, for appellant.

Plaintiff took the negotiable note in suit in good faith, without notice of the alleged agreement, as collateral security for money loaned at the time the note was indorsed to him. He is a bona fide purchaser, and therefore protected as against the alleged offset. 4 Am. & Eng. Enc. L. (2d Ed.) 289, 290; § 5130, Rev. Codes. The doctrine of constructive notice has no application to negotiable paper no matter how careless one is in dealing with it. He can claim to be a bona fide purchaser without notice, unless the circumstances show *mala fides*. Mere negligence is not sufficient to effect his rights. 4 Am. & Eng. Enc. L. (2d Ed.) 299, 301; § 4884, Rev. Codes. Authorities are divided on the proposition whether notice to an agent in order to constitute notice to the principal should have been acquired during the time he was acting for his principal, or whether knowledge of facts obtained previous to his employment will be held to be the knowledge of his principal, on it appearing that such knowledge was before his mind at the time he was acting for his principal. 1 Am. & Eng. Enc. L. 1149, 1150; Mechem, Agency, § 721. The party who seeks to charge the principal with knowledge obtained by the agent before the agency has the burden of proof by clear and satisfactory evidence that there was present in the agent's mind a recollection of the knowledge previously obtained by him at the very time he acted for his principal. *Lebanon Savings Bank v. Hollinbeck*, 29 Minn. 322; *In re Distilled Spirits*, 11 Wall. 367; *Fairfield Savings Bank v. Chase*, 72 Me. 226; Mechem, Agency, § 721; *Yerger v. Barz*, 8 N. W. Rep. 769; *Slaterry v. Schwannecke*, 23 N. E. Rep. 922; *Dresser v. Norwood*, 17 C. B. N. S. 466; *Red River Valley, Etc. Co. v. Smith*, 74 N. W. Rep. 194; *Trentor v. Pothen*, 49 N. W. Rep. 129; *Snyder v. Partridge*, 29 N. E. Rep. 851; *Burton v. Perry*, 34 N. E. Rep. 60; *Whittenbrock v. Parker*, 36 Pac. Rep. 374; *Constant v. University*, 111 N. Y. 604; *Wilson v. Minnesota*, 36 Minn. 112; 2 Pomeroy, Eq. Jur. § 673. In this state the strict and not the liberal rule as to

notice to an agent being notice to the principal, prevails. Section 4334, Rev. Codes, is a copy of § 1247 of the proposed New York Civil Code, and as appears from the notes of codifiers, was framed to express the strict rule. Although the paper be transferred after maturity set-offs between antecedent parties, which arose after the transfer, will not be available against the indorsee. 2 Daniels, Neg. Inst. § 1437. Baldwin was chargeable with notice because the paper was a negotiable instrument. *Hollinshead v. Stuart*, 8 N. D. 35.

Bosard & Bosard, for respondent.

Notice to Russell, appellant's agent, was notice to appellant. Plaintiff had actual or constructive knowledge of the contract securing the note in suit at the time he purchased. *Walker v. Flouring Mill Co.*, 35 N. W. Rep. 332; *Hovey v. Blanchard*, 13 N. H. 145; *Patten v. Ins. Co.*, 40 N. H. 375; *Hart v. Bank*, 33 Vt. 252; *Holden v. Bank*, 72 N. Y. 286; *Brothers v. Bank*, 54 N. W. Rep. 786; *Fishkill v. Bank*, 80 N. Y. 168; *Slattery v. Schwannacke*, 44 Hun. 83; *City Nat. Bank v. Bank*, 32 Hun. 110; *Cragie v. Hadley*, 99 N. Y. 134; *U. S. v. Davis*, 2 Hill, 451. Notice or knowledge acquired by an agent in a prior transaction and present in his mind at the time he is acting as such agent is notice to the principal. *Distilled Spirits*, 11 Wall. 356; *Brothers v. Bank*, 54 N. W. Rep. 786; *Wilson v. Ins. Co.*, 30 N. W. Rep. 401; *Hovey v. Blanchard*, 13 N. H. 145; *Loring v. Brodie*, 134 Mass. 453; *Bank v. Town*, 36 Conn. 93.

BARTHOLOMEW, C. J. This case must turn upon a question of fact. It was tried by the court below, and is triable de novo here. Plaintiff sues upon a negotiable promissory note, as indorsee. Defendant pleads an inherent equity in the note, and alleges that plaintiff took it with notice of such equity. He succeeded in reducing plaintiff's recovery by the amount of such equity. The trial court found that plaintiff took the note with knowledge, and upon that question of fact the case hinges. On March 6, 1896, the defendant, Baldwin, purchased a half section of land from the Security Trust Company at the agreed price of \$4,500. He executed to the grantor five promissory notes for \$500 each, and two notes for \$1,000 each, taking a contract for a deed. The two notes last mentioned represented two mortgages then upon the premises, for \$1,000 each, which Baldwin was to pay as a part of the purchase price. One of the mortgages would mature late in the year 1896, and the grantor, by parol, agreed to get that mortgage extended for four years, or until 1901. A written memorandum showing that such extension was to be made was entered in the loan register of the Security Trust Company. The home office of this corporation was at Nashua, N. H., but the Western office and principal place of business was at Grand Forks, N. D., and the transaction in question was had at the latter office. In June, 1896, the North Dakota Milling Company executed and delivered to the Security Trust

Company its promissory note for \$25,000. This note the Security Trust Company sold and indorsed to the plaintiff, Gregg. At the same time, and as collateral security on its indorsement, it transferred to said Gregg a large number of notes held by it, and among others the note herein involved, being one of the \$500 notes executed by defendant as purchase price upon said land. As a matter of fact, the Security Trust Company failed to have the mortgage on said land that matured in 1896 extended as orally agreed. The holder foreclosed, and defendant, Baldwin, was compelled to incur extra expense, by way of costs of foreclosure and increased interest, to save said land from such foreclosure. It is this expense that he seeks to offset against the note, claiming that plaintiff had knowledge of such agreement for extension.

It is conceded that at this time the plaintiff, Gregg, was the president of the Security Trust Company, and a member of the executive board thereof, and that the transactions of the company, such as the sale of lands, were always intended to be, and as a rule were, submitted to and discussed in detail by the executive board, sitting at the home office of the company, in Nashua, N. H. It is urged that these facts raise a presumption of actual knowledge on his part. We may grant that such a presumption arises. Its force is not great, under the circumstances. It appears that the written contract with defendant was detained in the Western office. The register of loans was, of course, in that office. If the contents of the contract were transmitted to the Eastern office, that alone, without the memorandum upon the loan register, would convey no intimation of any agreement for extension. We have no reason to suppose that plaintiff or the executive board was ever apprised of that memorandum entry. The Security Trust Company was engaged in making loans upon real estate. The memorandum was simply a reminder that a loan was to be made upon that tract of land at a future date at 7 per cent. interest. Naturally the matter would not be reported until the loan was made. There is in the evidence Mr. Gregg's clear and emphatic statement that he knew nothing about such an arrangement. That statement is contradicted only by the circumstances already stated. In our minds, they are far from sufficient to overcome positive testimony.

But respondent insists chiefly that plaintiff must be charged with knowledge by reason of the knowledge of his agent. In the spring of 1896 one Russell was sent from its home office, as agent of the Security Trust Company, to investigate the condition of the Western office, and report the same to the home office. He had full authority to examine all books and papers in the Western office, and to investigate the value of all securities held in that office. The business of the office was at that time large, and loans aggregating about \$1,000,000 were then outstanding. The agent, Russell, entered upon the discharge of his duties, and continued therein until in June, 1896, when he and Mr. Clifford, an officer and general Western manager of the Security Trust Company, went East. The contract with Bald-

win, it will be remembered, was entered into in March, 1896; and the contract was in the vaults of the company, and the memorandum was upon its loan register, during the time that Russell was investigating the condition of the business of the Western office prior to the trip East. The evidence also shows that after the trip to the home office in June, 1896, Russell returned to Grand Forks, and continued his investigations until October, 1896. The note given by the North Dakota Milling Company to the Security Trust Company was sold to the plaintiff, Gregg, while Russell and Clifford were at the home office. It appears that, when the negotiation was being perfected, plaintiff requested Russell to select the notes that were to be transferred to Gregg as collateral security. Respondent insists that Russell became plaintiff's agent in the selection of such notes. Russell testifies to the contrary, and the facts are not inconsistent with the idea that plaintiff, knowing that Russell as agent for the Security Trust Company, had become familiar with the value of its securities, and having confidence in his integrity, was willing to accept such notes as he might designate. Of course, Russell could not be the agent of both parties in such transaction, because their interests were opposed. We shall assume, however, in respondent's favor, that Russell for the moment ceased to be the agent of the Security Trust Company, and became the agent of the plaintiff. It is urged that Russell knew of the agreement for extension made by the Security Trust Company with Baldwin, and of the memorandum in the loan register. Russell testifies that he learned the facts later, but the trial court evidently believed that he was mistaken in that, and we may accept the judgment of the trial court. It is clear, however, that the information obtained before that time was not obtained in the course of his employment as the agent of plaintiff, but was obtained when he was acting in another capacity. Notice to an agent while acting within the scope of his authority, and in reference to a matter over which his authority extends, is, by the unbroken line of decisions, imputed to the principal. But beyond that the authorities are not uniform. The present prevailing and constantly extending doctrine appears to be that knowledge or notice acquired by a person will be attributed to a principal for whom such person subsequently acts as agent, with certain restrictions and limitations. Our statute seems to voice this later rule. Section 4334 reads: "As against a principal both principal and agent are deemed to have notice of whatever either has notice of and ought in good faith and the exercise of ordinary care and diligence to communicate to the other." The time at which the notice is acquired would seem to be immaterial under this statute. The principle now generally recognized, upon which the principal is charged with the knowledge of the agent, is not that the agent for the purposes of the transaction is a vice principal, but that the duty rests upon the agent, in fidelity to his principal's interests, to communicate to such principal any knowledge that he may have that would affect such interests. This duty the law presumes the agent has performed. This obligation on the part of the agent to communicate to his prin-

principal knowledge possessed by him affecting his principal's interests cannot, of course, be measured in any manner by the time at which such knowledge was obtained. If such knowledge was obtained while acting within the scope of his authority, and in reference to a matter over which his authority extended, then the law conclusively presumes that it was imparted, and the principal cannot escape by showing that it was not in fact in the mind of the agent at the critical time when it should have been imparted. But, if such knowledge was obtained at a time prior to the entry upon the agency, then whether or not it was present in the mind of the agent at the time when he acted for his principal in the matter wherein such knowledge became material is generally a question of fact. A case may be conceived wherein the information is of such a character and of so recent a date that it "is impossible to give a man credit for having forgotten." But such cases are rare. In those courts which charge a principal with knowledge acquired by his agent prior to the employment of such agent, it is uniformly held that such knowledge must have been present in the mind of the agent at the time he acted for the principal in the matter wherein the latter is sought to be charged with such knowledge. This holding is based upon the recognition of the frailty of human memory, and the fact that no duty rests upon the agent to disclose knowledge that he has forgotten, or, which is the same thing, that was not present in his mind when its disclosure could have influenced his principal, provided the circumstances be such that the forgetfulness can in law be excused. For full discussions of this subject, see *Mechem*, Ag. § 721, and cases cited in the notes; 1 *Am. & Eng. Enc. L.* (2d Ed.) p. 1150, and cases cited in note 2.

In the case at bar the respondent relies upon the fact that Russell must have received knowledge of the details of the transaction between defendant, Baldwin, and the Security Trust Company after March 6, 1896, the date of such transaction, and prior to the time he went East, in June, 1896; and he urges that this fact furnishes strong evidence that the knowledge was present in Russell's mind when he acted as plaintiff's agent in selecting the collateral notes. That it is a circumstance of weight must be admitted. Its weight would be greater were the Baldwin transaction an isolated one, or one of a few. The evidence shows that it was one of many,—presumably, several hundred. Russell was examining them for the purpose of making a final report thereon. The evidence shows that he made memoranda concerning each transaction. He did not trust to memory. He knew that the details of so many transactions could not be carried in the mind. He testifies positively that at the time he selected the collateral notes there was no knowledge or notice present in his mind of any agreement or understanding upon the part of the trust company to procure an extension for Baldwin. His conduct corroborates his testimony. He was at that moment the agent of plaintiff. To him he owed the first duty. He was bound to select valuable collateral. He says he selected the Baldwin note because he knew Baldwin's reputation as a business man. Certain it is that,

if he knowingly selected a note in which inhered an equity that might defeat a recovery upon the note in part or entirely, he was guilty of gross bad faith to his principal. We think the simple fact, if it be a fact, that he received the knowledge in the manner indicated, is entirely insufficient to prove that such knowledge was present in his mind when he acted for plaintiff, when opposed, as it is, by his conduct and his positive testimony. It follows that plaintiff did not take the note in suit with notice of any inherent equities.

We have decided this case along the lines upon which it was presented by counsel. No claim is made that the offset would not be proper if plaintiff took with knowledge. The District Court of Grand Forks county is directed to so far modify its former judgment herein as to render judgment in favor of plaintiff and against defendant for the full amount of the one note for \$500 and interest as therein provided, with costs of both courts. Modified and affirmed. All concur.

(84 N. W. Rep. 373.)

WELLS-STONE MERCANTILE COMPANY *vs.* AULTMAN, MILLER & COMPANY.

Opinion filed November 9, 1900.

Deed of Trust—Reimbursement of Trustee

A general merchant in embarrassed financial circumstances executed a deed of trust for the benefit of his creditors. The deed was executed by the trustor, the trustee, and the beneficiaries. The trustee was authorized to close out the mercantile business, and to that end was authorized to purchase such staple goods to replenish the stock as would, in his judgment, the better enable him to close out the stock. The beneficiaries were to receive only the net proceeds of the estate after paying all expenses of executing the trust. *Held*, that the trustee had a right to reimburse himself for all expenses incurred in executing the trust before paying dividends to the beneficiaries, and that the purchase price of staple articles so purchased by the trustee to replenish stock constituted a part of the expenses of executing the trust.

Reimbursement of Trustee from Moneys Paid to Beneficiaries Under the Deed.

Where the trust estate had been exhausted, and such expenses remained unpaid, but large dividends had been paid by the trustee to the beneficiaries, that the trustee might, in equity, require the beneficiaries to refund sufficient from the dividends so received to reimburse him for such expenses.

Creditors Subrogated to Rights of Insolvent Trustee.

That where, in addition to the facts recited, it appeared that the trustee was insolvent, the creditors who had thus furnished such goods might be subrogated to all the equities of the trustee as to the trust property, including the right to require the beneficiaries to refund; and this, too, even where a portion of the goods was so delivered to the trustee after payment of the last dividend.

Appeal from District Court, Cass County; *Pollock, J.*

Action by the Wells-Stone Mercantile Company against Aultman, Miller & Co. and others. Judgment for plaintiffs. Defendant appeals. Affirmed.

Newton & Smith, Morrill & Engerud, Mills, Resser & Mills, for appellants.

This action arises out of the same subject-matter as the case of the same plaintiff against G. A. Grover, et al, 7 N. D. 460. On the 19th day of December, 1894, Grover executed a deed of trust to one Jones; Jones accepted the trust and qualified, and took possession of Grover's property. It is provided in this deed that Jones shall have power to continue the general merchandise business, sell the stock of merchandise at private sale in the usual course of trade, replenish the stock with articles of staple goods to the extent necessary to successfully continue the business. A dividend of 45 per cent. was paid to the creditors, and the report of the trustee at the time the last payment was made disclosed that he then held in his hands a net surplus of over \$10,000. Subsequently the assignee, Jones, distributed the money in his hands and closed the estate without paying the debt of plaintiff for goods sold and delivered to Jones, as trustee, to replenish the stock of merchandise while he was continuing the business. Plaintiff asked that it be subrogated to the rights of Jones, as trustee, that the defendants account for the respective sums received from Jones, as trustee, and that each of the defendants pay over to plaintiff such pro rata share of the sums received as should be necessary to pay the plaintiff's claim. It is well settled that the creditor cannot claim any lien on, or equitable right in, the trust estate, but must look entirely to the trustee and his individual property for his pay. *Wells-Stone Mercantile Co. v. Grover*, 7 N. D. 463. In case the trustee pays the indebtedness he may claim reimbursement from the funds in his hands. From such right arises an equity in favor of the creditor, under peculiar circumstances, to proceed directly against the trust property. *Hewitt v. Phelps*, 105 U. S. 393, 26 L. Ed. 1074. The peculiar circumstances referred to are where expenditures have been made for the benefit of the trust estate and it has not paid for them directly or indirectly, and the estate is either indebted to the trustee or would have been if the trustee had paid, and the trustee is insolvent or not resident so that the creditor cannot recover his demand from him, or will be compelled to follow him to a foreign jurisdiction. In such case the trust estate may be reached directly by a proceeding in chancery. In such instances the creditor is subrogated to the right of the trustee against the estate. *Hewitt v. Phelps*, 105 U. S. 393; *Wells-Stone Mercantile Co. v. Grover*, 7 N. D. 463 and cases cited in opinion. The parties may agree that the trustee shall not be held personally liable on the contract, that only the trust estate shall be chargeable with the debt. *New v. Nicol*, 73 N. Y. 127; *Gill v. Carmine*, 55 Md. 339-343. If the trustee distributes the estate, leaving unpaid any of the debts incurred by him in executing the trust, a court of chancery will subrogate the creditor to his

equity, and allow the creditor to follow in the hands of those who had received the property, the portion of the assets paid them by the trustee. 7 N. D. 464; *Clopton v. Gholson*, 53 Miss. 466; *Ferne v. Mayers*, 53 Miss. 458; *Gueerry v. Caper*, 1 Bailey's Eq. (S. C.) 159; *Dowse v. Gorton*, 40 Ch. Div. 536; *Shearman v. Robinson*, 15 Ch. Div. 548; *Packard v. Kingman*, 67 N. W. Rep. 551.

Newman, Spalding & Stambaugh, for respondents.

Jones, as trustee, was authorized, under the deed, to contract the debt in controversy. He contracted with respondent upon the credit of the trust estate and not upon his own personal responsibility, and the credit was extended to the trust estate and not to Jones. Jones was authorized to bind the trust estate by his contract and the trust estate is bound for the payment of respondents' claim. *Rice v. Lane*, 44 N. E. Rep. 133.

BARTHOLOMEW, C. J. This is an action brought to compel the beneficiaries under a trust deed to return certain money received by them from the trust estate, to the end that the same may be applied in payment of certain liabilities incurred in the execution of the trust. On a trial to the court the plaintiff succeeded, and the defendants appeal, and ask a retrial of the entire case. This controversy, in a somewhat different form, was before us in *Mercantile Co. v. Grover*, 7 N. D. 460, 75 N. W. Rep. 911. The plaintiff sold goods to the trustee named in a trust deed, and has not received pay therefor. In the former action he sought to recover against these defendants and others, who are beneficiaries under the deed, upon the ground that they were in fact partners in conducting the trust business, and the trustee was their agent in purchasing the goods. This position was held by this court to be unsound, but in answering the contention of counsel that, if the plaintiff failed in that case, it was without remedy, we said that the trustee became personally liable on every contract made by him in the discharge of his trust. We also said: "It is true that the trustee may claim reimbursement from the funds in his hands for any proper expenditure made by him in the execution of the trust, and this equity is the foundation of the right of the creditor, under peculiar circumstances, to proceed directly against the trust property itself. See *Hewitt v. Phelps*, 105 U. S. 393, 26 L. Ed. 1072; *Clopton v. Gholson*, 53 Miss. 466; *Norton v. Phelps*, 54 Miss. 471; *In re Johnson*, 15 Ch. Div. 548; *Dowse v. Gorton*, 40 Ch. Div. 536; *Mason v. Pomeroy*, 151 Mass. 164, 167, 24 N. E. Rep. 202, 7 L. R. A. 771." And again we said: "Of course, the parties may agree that the trustee shall not be held personally on the contract, but that only the trust estate itself shall be chargeable with the debt. In such a case, if the instrument creating the trust authorizes this to be done, or even when it does not give such authority, if the circumstances are peculiar, the trustee is not bound, but the fund is. *New v. Nicol*, 73 N. Y. 127; *Gill v. Carmine*, 55 Md. 339, 342, 343." And still further, in speaking of the trustee, we said: "And if he should distribute the estate, leaving

unpaid any of the debts incurred by him in the execution of the trust, we have no doubt that a court of chancery would subrogate the creditors to his equity, and allow them to follow, in the hands of those who had received the property, the portion of the assets which had been paid to them by the trustee. And even while the trust property is still in the hands of the trustee, those who had dealt with the trustee as such might, under special circumstances, obtain a decree impressing upon such property an equitable lien in their behalf. See cases first above cited." Plaintiff in this action seeks to bring itself within some or all of these conditions. We restate a portion of the facts: One Grover, a general merchant doing business at Horace, in Cass county, became financially embarrassed. His property was incumbered by liens. He entered into an arrangement with creditors for an extension of time. In pursuance of such arrangement, he made a trust deed of all of his property to one Jones. The deed was executed by Grover as trustor, and Jones as trustee, and the creditors as beneficiaries under the trust. The trust deed contains the following language: "Said party of the second part shall take possession of said property and business of the said party of the first part, and shall sell, dispose of, and convert said property, and the good will of said business, into money, by and through said party of the first part, or such other person or persons as said party of the second part shall designate and appoint for that purpose, and in such manner and at such time or times as, in the judgment of the said party of the second part, will produce the most money; and that the net proceeds thereof, after payment of all costs and expenses of executing the trusts hereby established, shall be distributed among said creditors in the manner following, to-wit." Then follow provisions for pro rata distribution among secured creditors, and, when their claims are satisfied, then among unsecured creditors. We then find the following provision: "The said party of the second part shall have power to continue said general merchandise business and to sell the stock of general merchandise at private sale, and in the usual course of trade, and to replenish said stock of merchandise with such articles of staple goods as may be necessary to successfully continue said business; and such power shall continue so long as said party of the second part shall be of the opinion that the interests of said creditors will be best subserved by that method of executing said trust." The complaint in this action, after all necessary formal allegations, including the execution of the trust deed and the entry of the trustee upon his duties thereunder, alleges that said trustee applied to plaintiff to purchase certain staple goods to replenish said stock of general merchandise, and agreed that for goods so purchased he would pay plaintiff in the ordinary course of business out of the proceeds of said trust property, and that under such agreement plaintiff sold and delivered to such trustee staple goods and merchandise to replenish said stock in the amount of \$1,292.85, and that a balance of \$532.65, and interest from February 1, 1896, remains due and unpaid on said account. It also alleges that all of said trust estate has been exhausted, and the

trust closed, and a large amount of money arising from said trust estate distributed by said trustee to these defendants. It also alleges the insolvency of said trustee, and that he has no funds of said estate from which to pay the claim of plaintiff. Several of the defendants filed separate answers, but their general purport is the same, and consists of a denial of the special allegations of the complaint already referred to, and particularly denies that the trust estate has been closed out, and the trust terminated, and denies the insolvency of the trustee, alleges that he is indebted to the trust estate, and that judgment had been obtained against him. One answer also pleads the former judgment as an adjudication. It is also answered that at the time these defendants received their last dividend there was owing to plaintiff from the estate only the sum of \$234.82. One of the defendants demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action, and because it showed a defect of parties defendant. Objections to the introduction of evidence under the complaint were made for the same reasons, and we therefore first notice these points.

There is no merit whatever in the objection that the complaint shows a defect of parties. True, the trust deed discloses that there were many other creditors of Grover; but they were unsecured creditors, and have received nothing on their claims. The theory of this action is that these defendants have received money from the proceeds of the trust property which they cannot, in equity, withhold from this plaintiff. Of course, no such claim can exist against one who never has received anything from the trust property. And here it is germane to remark that the defense of former adjudication cannot prevail. As we have seen, the former action was brought against all the creditors of Grover on the theory of a partnership under the trust deed. The issues here raised were not, and could not have been, litigated in that case.

The complaint states a cause of action. True, it does not appear that these defendants ever assented to this particular purchase from plaintiff, but this is not an ordinary trust created by will or the act of the trustor and trustee alone. The beneficiaries expressly agreed to all the terms of that deed. They gave the trustee unlimited discretion in replenishing that stock of merchandise, and they, in terms, agreed that only the net proceeds of the estate, after paying all costs and expenses of executing the trust, should be distributed to them; and counsel concede that the purchase price of these goods received from plaintiffs constitutes a part of the expenses of executing the trust. We think the complaint also sets forth the particular grounds which relieve it from looking exclusively to the primary liability of the trustee. It alleges that he has no trust property in his hands, and that he is insolvent. It alleges that the goods for which payment is sought were sold and delivered to him as such trustee. We think this raises a presumption that the estate received the benefit of the goods. In that event, had he paid for the goods, he might have reimbursed himself before any distribution to the

beneficiaries. Nor was it necessary, as a matter of pleading, for the plaintiff to state the account between the estate and the trustee, in order to show that the trustee was not indebted to the estate, and so barred from reimbursing himself for expenditures from the trust estate. If the trustee was so indebted, that fact was matter of defense. It has been so pleaded by the answering defendants. The general principles which control in cases of this character are well stated in *Norton v. Phelps*, 54 Miss. 467-471, as follows: "The principle is that, while persons dealing as creditors with the trustee must look to him personally, and not to the trust estate, yet where the estate has received the benefit of expenditures procured to be made for it by the trustee, and it has not in any way borne the burden of these expenditures properly chargeable to it, and to fasten the charge upon it will do it no wrong, but simply cause it to pay for what it is liable to the trustee, or would be liable if he had paid it or should pay it, and because of the insolvency or nonresidence of the trustee our tribunals cannot afford the creditor a remedy for his demand, he may proceed directly against the trust estate, and assert against it the demand the trustee could maintain if he had paid or should pay the claim, and should himself proceed against the trust estate." It is true that this case, being subsequently transferred to the federal courts, the Supreme Court, in 105 U. S. 393, 26 L. Ed. 1072, decided the case differently; but the principle above quoted was expressly approved, and the Federal Supreme Court said: "The ground and reason for this rule is that the trustee has an equity of his own for reimbursement for all the necessary expenses to which he has been put in the administration of his trust, which he can enforce by means of the legal title to the trust estate vested in him; and that his creditor, in the cases supposed of his insolvency or absence from the jurisdiction, may resort to the equity of the trustee upon a principle of equitable substitution or attachment, for his own security." In *Mason v. Pomeroy*, 151 Mass. 167, 24 N. E. Rep. 203, 7 L. R. A. 773, it is said: "That is to say, where trustees who are authorized to carry on a business contract debts, they are not only liable personally for the payment of them, but the creditors may also resort to the trust fund, subject, however, to the rules of equity, as applicable to the facts and circumstances which may exist in any particular case. *Ex parte Garland*, 10 Ves. 110; *Ex parte Richardson*, 3 Madd. 138; *Owen v. Delamere*, L. R. 15 Eq. 134; *Cutbush v. Cutbush*, 1 Beav. 184; *Thompson v. Andrews*, 1 Mylne & K. 116; *Burwell v. Mandeville*, 2 How. 560, 11 L. Ed. 378; *Smith v. Ayer*, 101 U. S. 320, 330, 25 L. Ed. 955; *Jones v. Walker*, 103 U. S. 444, 26 L. Ed. 404; *Pitkin v. Pitkin*, 7 Conn. 307; *Lewin, Trusts* (7th Ed.) 217. It is, indeed, contended on the part of the plaintiffs that their right to resort to the trust property is a primary and original right, which exists independently of any right on the part of the trustee to be indemnified. *Wyllly v. Collins*, 9 Ga. 223. The view, however, which has prevailed in England, so far as the question has been discussed, is that the creditors may reach the trust property when the trustees are entitled to be indemnified therefrom.

and that the creditors reach it by being substituted for the trustees, and standing in their place. *In re Johnson*, 15 Ch. Div. 548; *Dowse v. Gorton*, 40 Ch. Div. 536." Under these authorities it is clear that plaintiff was entitled to recover in this case, unless the trustee was so far indebted to the estate that he would have had no right of recovery had he paid plaintiff's claim. We see no reason, and none has been suggested, why these principles should not apply after the distribution of the estate as well as prior thereto. In *Norton v. Phelps*, supra, the entire trust estate had been turned over to the beneficiary. In the case at bar the beneficiaries, by their express contract, agreed that they should receive only the net proceeds of the trust estate after payment of all expenses of executing the trust. If they have received the proceeds of the estate in violation of this contract, we know of no principle of equity that will permit them to retain such proceeds. Clearly, the complaint was sufficient upon this ground alone.

Plaintiff also sought to allege that by the contract between itself and the trustee the goods were sold in the exclusive reliance upon the trust estate, and that by such contract the trustee incurred no liability. The principle seems to be clearly recognized that under a contract of that character the creditor may proceed directly against the trust estate. *Gill v. Carmine*, 55 Md. 339; *New v. Nicoll*, 73 N. Y. 127. We express no opinion as to the sufficiency of the complaint upon this last point, or upon the proof under these allegations. The trial court evidently decided the case upon this theory; but, without intimating that the court was wrong in so deciding, we prefer to place our decision upon a more certain ground, but one that was not open to the trial court. Before this case was tried in the District Court, the case of *Scott v. Jones* had been tried in the same court, and judgment rendered against the defendant for the sum of \$1,000. In that case Scott represented the trust estate here involved, and the defendant Jones was the trustee here involved, and that action was brought to compel an accounting by the trustee. On the trial of this case the judgment in that case was admitted, which, of course, showed the trustee indebted to the estate. It followed that, under the authorities first above cited, had the trustee paid plaintiff's claim, he would have had no equity that would have permitted him to reimburse himself from the trust estate, because he was already indebted to that estate, and hence he had no equity to which this plaintiff could be subrogated. But Jones appealed from the judgment against him in the District Court, and at this term of this court we reversed that judgment, and dismissed the action as against Jones. See *Scott v. Jones*, 9 N. D. 551, 84 N. W. Rep. 479. The judgment in that case establishes the fact that the trustee is not and was not indebted to the estate. Section 5713d, Rev. Codes, requires this court not only to take judicial notice of its own judgments and records, but also of the fact that the case now before the court has connection with the one formerly decided by it. The case is here for trial *de novo*. We must try it upon the record before us and upon the facts, of which we must take judicial notice. We conclude, as did the

trial court, that the trust is closed, and the estate exhausted. There is no undistributed trust property. The trustee is insolvent. Unless the defendants are required to return funds received from the trust estate contrary to the terms of their contract, plaintiff is without remedy. The defendants are clearly liable. But they urge that in no event can they be held liable to the extent adjudged by the District Court, and for this reason: It is undisputed that a portion of the goods the purchase price of which plaintiff seeks to recover were delivered to the trustee after the payment by the trustee to the beneficiaries of the last dividend, and defendants contend that they cannot be held for expenses incurred subsequent to the payment of any dividend. We think that is not sound, although we find no express authority. The goods went into the trust estate, and augmented the estate by that much. They were undoubtedly absorbed in paying expenses growing out of the business. At the time the last dividend was paid, it is clear from the statement of the trustee then made that he supposed he was retaining ample in his hands to pay all expenses that had been or might be incurred. In that he was in error. He did not realize from the property as anticipated. If, under these circumstances, he had paid plaintiff's claim, and found himself without trust property from which to reimburse the outlay, we think in equity he could call upon these beneficiaries to reimburse him from dividends received. If the trustee had that equity, then, on principles already discussed, this plaintiff is subrogated thereto. The judgment of the District Court is affirmed. All concur.

(84 N. W. Rep. 379.)

GEORGE S. MONTGOMERY, AS RECEIVER, v's. W. H. HARKER.

Opinion filed October 25, 1900.

Mutual Insurance—Applications for Membership.

The securing of applications for membership and insurance in a purely mutual insurance company to a certain number and amount is required by section 3104, Rev. Codes, as a pre-requisite to the existence of the right to issue policies, and also to the right of the commissioner of insurance to issue the certificate of authority to do business, authorized by section 3090, Id. The taking of such applications is a necessary step in the formation of the corporation and is required to be done prior to the issuance of a certificate from the commissioner of insurance authorizing such corporation to commence business, and is not in violation of the provisions of the statute prohibiting the doing of an insurance business without such certificate.

Payment of Annual Sum When No Assessment Made—Credit.

Where a member of a mutual insurance company has obligated himself to pay such annual assessments as shall be made, not to exceed a specified sum each year, and in anticipation of an annual assessment pays to the treasurer the amount of an annual assessment in advance, and such assessment is not in fact made, the sum so paid stands to his credit, and he has a right to apply the same on an assessment for a succeeding year.

Appeal from District Court, Richland County; *Lauder, J.*

Action by George S. Montgomery, receiver of the Red River Valley Mutual Hail Insurance Company, against W. H. Harker. Judgment for plaintiff. Defendant appeals.

Reversed.

Redmon, Ink & Wallace, for appellant.

Persons claiming to have organized themselves into a corporation under the general law are not free from having their claim attacked collaterally when no articles of association are filed. *Abbott v. Omaha Smelting Co.*, 4 Neb. 416; *Childs v. Smith*, 55 Barb. 45. The corporation is deemed to exist from the time the certificate of incorporation prescribed by statute is issued. Thereafter the lawfulness of the existence of the corporation cannot be denied in any controversy, except in an action by the state to vacate its franchise. *Palmer v. Lawrence*, 3 Sand. 161; *Hunt v. Kansas-Missouri Bridge Co.*, 11 Kan. 412; 1 Thomp. Corp. § 219. There is a difference where a corporation is existing by special charter and there have been acts of user and where individuals seek to form themselves into a corporation under the provisions of a general law. In the latter case it is only in pursuance of the statute for such purposes that the corporate existence can be acquired. *Bigelow v. Gregory*, 73 Ill. 194, 201. The existence of a corporation formed under the general law must be proved by showing at least a substantial compliance with the statute. *Mokelumne Mill Co. v. Woodbury*, 14 Cal. 424; *Bigelow v. Gregory*, 73 Ill. 197; *Union Ins. Co. v. Cramer*, 43 N. H. 641; *Harris v. McGregor*, 29 Cal. 124; *Abbott v. Omaha Smelting Co.*, 4 Neb. 416; *Granby Mining Co. v. Richards*, 95 Mo. 106; *Kaiser v. Lawrence Savings Bank*, 56 Ia. 104; *Gent v. Manufacturers, Etc., Ins. Co.*, 107 Ill. 652. The taking by appellants of premium note and mortgage was doing an insurance business within the meaning of the state. §§ 3124 and 3131, Rev. Codes. The doing of such business was illegal. *State v. Hogan*, 8 N. D. 301, 78 N. W. Rep. 1051, and that consequently appellants' note and mortgage are void.

W. E. Purcell, for respondent.

Respondent's assignments of error are insufficient under Rule XII, Supreme Court Rules. *Henry v. Maher*, 6 N. D. 415; *Thompson v. Cunningham*, 8 N. D. 106; *Globe Investment Co. v. Boyum*, 3 N. D. 538; *O'Brien v. Miller*, 4 N. D. 308. All objections to the evidence in this record may be disposed of together. There are no objections. This case is another illustration of the fearful consequences of becoming addicted to the "incompetent, irrelevant and immaterial" all strung together habit, the appetite for which once acquired seems beyond cure. *Kolka v. Jones*, 6 N. D. 461. The question of the regularity of this incorporation was for the state. It has recognized the corporation by the issuance of its license to transact

business of insurance. *Taylor on Corp.* § 145; *Freeland v. Ins. Co.*, 94 Pa. St. 504; *Frost v. Company*, 24 How. 278. The state, which alone can incorporate, may waive the breach or acquiesce in the usurpation, the wrong being to the state and not to the individuals. *Lehman, Dore & Co. v. Warner*, 61 Ala. 455; *Bakersfield Ass'n. v. Chester*, 55 Cal. 99; *Humphrey v. Money*, 5 Colo. 282. Defendant was a promoter and member of this corporation. Having dealt with the corporation as existing in fact, he is estopped to deny as against the corporation that it has been legally organized. *Close v. Glenwood Cemetery*, 107 U. S. 466, 477; *McLynch v. Sturgess*, 32 Me. 288; *Battelle v. Northwestern Cement, Etc., Co.*, 33 N. W. Rep. 327; 4 Am. & Eng. Enc. L. 199. All the members of this company being co-insurers, and the deeds and obligations of contracts being mutual, the defendant cannot plead such failure in an action against him to enforce his liability as co-insurer. *Washburn Mill Co. v. Bartlett*, 3 N. D. 138, 54 N. W. Rep. 544; *Whitney v. Wyman*, 101 U. S. 392.

YOUNG, J. The plaintiff is the receiver of the Red River Valley Mutual Hail Insurance Company of North Dakota, a domestic insurance company organized in April, 1898, under chapter 14 of the Civil Code, with principal place of business at Wahpeton. Plaintiff was appointed receiver by the District Court of Richland county on December 29, 1899, in an action instituted in that court by the commissioner of insurance of this state, and immediately thereafter took possession of the assets of said corporation. A large portion of the assets consists of assessments levied upon the members of the corporation by the directors, some 1,800 in all, and which plaintiff claims are unpaid. But one assessment was made. That was levied on September 11, 1899, and was 5 per cent. of the face amount insured by each policy. This defendant had a five-year policy for \$300, and this action is to collect \$15 assessed against him on such policy. The case was tried in the District Court without a jury. The court found for the plaintiff, and judgment was entered in accordance therewith. Defendant appeals from the judgment, and in a settled statement of the case embodying all of the evidence offered demands a trial anew of the entire case in this court. The evidence in the record is of considerable volume, and in some particulars is conflicting, but as to all facts which are decisive there is no conflict. The following facts are all that are material to a determination of the issues: On February 10, 1898, seven persons, residents of the city of Wahpeton, executed articles of incorporation for the purpose of organizing the aforesaid corporation under chapter 14 of the Civil Code of this state. On February 23, 1898, said articles were approved as to form by the attorney general, and filed in the office of the commissioner of insurance, and on the same day, to-wit: April 23, 1898, the commissioner of insurance issued his certificate, reciting that said company had fully complied with all of the requirements of the

insurance laws of the state relating to said company, and that it was authorized to transact a hail insurance business from and after the date of such certificate. A certified copy of the articles of incorporation, together with a copy of the certificate of authorization, was filed and recorded in the office of register of deeds of Richland county on April 29, 1898. On March 1, 1898, the defendant signed and delivered to one H. F. Meeker a partly written and partly printed application for insurance in said company, which application stated that the amount of insurance desired was \$300, and for a period commencing March 1, 1898, and ending January 1, 1903, and gave the description of the lands to be covered by the policy. The application also contained the following: "I hereby apply for membership and insurance in the above-named company, and agree to pay all just assessments, not to exceed five per cent. of the face value of my policy or ——— dollars, per annum, to be governed by the articles of incorporation and by-laws of the company." On the same day, and as part of the transaction, the defendant delivered to Meeker a note in the following language: "On or before the first day of October, 1898, I promise to pay to the Red River Valley Mutual Hail Insurance Company of North Dakota the sum of fifteen and no-100 dollars, or such portion thereof as may be assessed on my policy by the officers of said company for payment of expenses and losses by hail according to the by-laws, rules, and regulations of said company, with interest at the rate of 8 per cent. per annum from the maturity hereof." This was secured by a chattel mortgage upon the crops to be insured, and was paid by the defendant to the corporation in full prior to the making of an assessment. In fact, no assessment was made in 1898, or other than that now sued on. About the 10th of May, 1898, a policy was issued and delivered to the defendant, corresponding with the application, and reciting that it is based upon his application. On the back of the policy there is printed a notice of the date of the annual meeting, and notice that by virtue of the policy the defendant is a member of the corporation. The articles of incorporation and by-laws are also printed thereon. On the back, too, these words appear, "Total liability of assessment, \$15." Section 6 of the bylaws provides that "any person wishing to become a member of this company shall sign an application containing an agreement to pay all just assessments, and shall give security for the same, as shall be required by the board of directors; provided, said sums do not exceed five per cent. of the amount insured, and as governed by the by-laws of the company and its articles of incorporation. He shall pay a membership fee of \$2." Section 17 provides that "there shall be but one assessment each year, and that for only such sums as may be required to pay the losses and expenses of the business done by the company." Another section provides a method for transferring the policy to other property, and another provides for cancellation of policies. Meeker did not have a certificate of authority from the commissioner of insurance, as provided for in section 3124, Rev. Codes, when he took the defendant's appli-

cation; neither was the corporation then authorized to do an insurance business. On September 11, 1899, the directors ordered an assessment of 5 per cent. upon the policy holders of the company, and due notice of such assessment was served on this defendant. There were some 170 unpaid losses for 1899, and an assessment was necessary to pay such losses. Do these facts establish the defendant's liability for the assessment demanded. He says not, and presents two reasons, which we shall now consider.

First, he contends that the policy upon which plaintiff predicates his right to recover is void. This contention is based upon the fact that Meeker, who took defendant's application, did not have a certificate of authority as required by section 3124, *Id.*; and upon the further fact that no certificate of authorization had at that time been issued by the commissioner of insurance, authorizing such corporation to do an insurance business. Briefly stated, his contention is that in procuring the defendant's application, without such precedent authority, the corporation, through its agent, was doing or attempting to do an insurance business contrary to the prohibitions of the laws of this state relative to doing insurance business, and he concludes therefrom that not only is the application void, but that the policy thereafter issued on such application is also void, and accordingly furnishes no basis for any legal liability. We have occasion to notice this position only to the extent of pointing out the reasons why, in our view, counsel is in error in claiming that the taking of the application by Meeker, without a certificate of authority, was in violation of the statute. The corporation in question is a domestic mutual insurance company. Article 4 of chapter 14 of the Civil Code, under which it was organized, relates exclusively to this class of corporations. The first section contained in article 4, § 3104, *Rev. Codes*, provides that: "No policy shall be issued by a purely mutual insurance company until not less than two hundred thousand dollars of insurance in not less than one hundred separate risks have been subscribed for and entered on its books." Section 3090, *Id.*, provides that the commissioner of insurance shall, after the attorney general has approved the form of the articles of incorporation, "make an examination to ascertain whether the company has in all respects complied with the requirements of law, according to the nature of the business proposed to be transacted by it, and if satisfied by such examination that the corporation has complied with the law he shall deliver to such corporation a certified copy of the articles of incorporation and a certificate to the effect that such corporation has complied with all the requirements of the law, which on being filed in the office of the register of deeds of the county where the principal office of the corporation is located, shall be its authority to commence business and issue policies; and such certified copy of such articles of incorporation and of such certificate may be used for or against such company with the same effect as the original, and shall be conclusive evidence of the fact of the organization of such corporation." Elsewhere in article 4 it is

provided that every policy-holder is a member of the corporation while his policy is in force (section 3105, Rev. Codes), and is entitled, when his policy expires, to a share of the net profits or surplus earned while his policy was in force; and is in like manner liable to pay his proportionate share of assessments levied by the company, in accordance with law and his contract, for losses and expenses incurred while he was a member. *Id.* § 3110. From the sections of the statute above quoted it will be seen that the corporation had no existence prior to the issuance of the certificate of authorization by the commissioner of insurance, which occurred on April 23, 1898. Prior to that time, of course, it could accordingly have neither officers nor agents. Up to that time all persons connected with the proposed corporation were merely promoters, proposed officers, or proposed members. One of the chief requirements of the statute to be performed before a single policy can issue is that a certain number of policies and a certain amount of insurance shall be subscribed for. This had to be obtained not only before a policy could issue, but also before the commissioner of insurance could issue a certificate of authority to do an insurance business; for his certificate is unconditional, and authorizes the issuance of policies. Plainly, this condition that the requisite amount of insurance shall have been subscribed is one which the commissioner is required to examine into before he makes his certificate. The procuring of such subscription in the form of applications for insurance and membership, such as the defendant executed, is, then, not prohibited, but is expressly authorized, by the statutes relating to the organization of this class of corporations, and does not constitute the doing of insurance business. Then, too, Meeker was not its agent. The corporation did not then exist. The defendant acted for himself in making application for membership and insurance in the contemplated corporation. After the certificate of authorization was issued, the corporation had an existence, and was authorized to do an insurance business. Prior to that time all acts done were those of individuals, and not those of the corporation, and related to the organization of the corporation. The defendant, in pursuance of his application for membership, received a policy. This was after the commissioner of insurance had issued his certificate of authority. By receiving and retaining such policy, the defendant became a member of such corporation, and subjected himself to lawful assessments for losses and expenses accruing during the life of his policy. The objection that the taking of defendant's application, which is in the nature of a subscription for insurance and membership, was doing an insurance business in violation of the statute is without merit.

But defendant claims that, in any event, he is not liable for the assessment sued on, for the reason that his entire legal liability to such corporation was discharged by the payment of the \$15 note before referred to, which sum so paid represented the highest and only sum he could, under his policy, be assessed for in any one year. Before considering this claim, it will be necessary to refer to sec-

tion 3108, Rev. Codes, which prescribes what payments shall be required from members of this class of corporations for indemnity afforded against losses. This section reads: "Mutual insurance companies shall charge and collect upon their policies the full mutual premium in cash or notes absolutely payable and may in their by-laws fix the contingent mutual liability of its members for the payment of losses and expenses not provided for by their cash funds; provided, that such contingent liabilities of a member shall not be less than a sum equal to and in addition to the cash premium written in his policy. The total amount of the liability of a policyholder shall be plainly and legibly stated upon the back of each policy." The language of the section just quoted is unambiguous, and plainly requires the corporation to charge and collect a fixed premium from each of its members. This may be cash in advance, or a note payable absolutely. But it is an absolute and unconditional payment; a premium, in fact; and is to be written in the policy. The funds derived from such premium constitute a cash fund subject to be used for the payment of losses and expenses. As to the further liability of the members for losses and expenses not provided for by such cash fund, the corporation is authorized to fix a limit, but is prohibited from making such contingent liability less than the amount of the cash premium. Such contingent liability is clearly in addition to the cash premium, and up to the limit fixed by the corporation, which in this case was 5 per cent. of the face of the policy, is entirely dependent upon a failure of the cash fund derived from absolute premiums to cover the amount of the expenses and losses of the corporation. If our interpretation of this section requires support, it will be found in the two succeeding sections, 3109 and 3110, which provide for the disposition of such surplus funds as might possibly accumulate from the payment of cash premiums. The statute plainly provides for a double liability. The first is absolute, namely, the cash premium fixed by the corporation, either in the form of cash paid in advance, or a note payable absolutely; the second, a contingent liability, also to be fixed by the corporation, but at an amount not less than the cash premium. The manifest purpose of requiring such corporations to charge and collect a full mutual premium is to protect the public against worthless insurance, and to afford to persons effecting insurance on the mutual plan adequate and reliable indemnity for losses. If the above requirement is complied with, the policy-holder does not have to look alone to the contingent liabilities of the other members, which are at best of uncertain value, for the payment of his loss, but has a definite and existing fund, accumulated either from cash exacted in advance or from notes payable absolutely. The record in the case at bar shows that this provision was entirely disregarded by this corporation, not only in its contract with this defendant, but it appears that no attempt at compliance with such requirement was made in any instance. No premium was fixed. The by-laws show that the extent of the promise exacted from members was that they would be liable

for an annual assessment of 5 per cent. on the face of the policies in case they should be necessary to pay losses and expenses. That is the extent of the promise made by this defendant. It is entirely clear that no liability became fixed, or legal demand against the defendant became absolute, until an assessment was made. An examination of the note executed by the defendant will show that it added nothing to the defendant's liability. In it he merely agreed to pay in pursuance of an assessment up to \$15, and that is just what he was obliged to do by the by-laws, which constituted a part of his contract. The promise to pay anything on the note was altogether contingent on an assessment. No assessment was made for 1898, or any assessment other than the \$15 assessment here involved. Does the fact that defendant paid to the treasurer of the company the sum which is now sought to be recovered before an assessment was made defeat plaintiff's right to recover? We think it does. When it was paid, the corporation had no legal claim against him. It was evidently paid in anticipation of an assessment for that amount for 1898. Had such an assessment been made, it certainly would have been applied in payment of it. But there was no assessment until 1899. During this time the money stood on the books of the corporation to the credit of the defendant, and he certainly had the undoubted right to insist, as he does, that it be applied on the assessment now sued on. For authorities holding that assessments paid in advance, or in excess of those legally levied, shall be credited on assessments subsequently made, see *Association v. Baldwin*, 49 Ill. App. 203; *Davis v. Parcher & J. A. Steward Co.*, 82 Wis. 488, 52 N. W. Rep. 771; *Insurance Co. v. Jarvis*, 22 Conn. 133; *McGowan v. Association*, 76 Hun. 534, 28 N. Y. Supp. 177; 2 Joyce, Ins. § 1262. We have assumed, for the purposes of this decision, without deciding the question, that the policy is valid, and that the assessment was legal. Even in that event, for the reason just stated, the plaintiff cannot recover. The judgment of the District Court is reversed. All concur.

ON PETITION FOR REHEARING.

A rehearing and reargument is requested in this case by respondent upon the ground that our decision was made upon "a misapprehension of the facts adduced in evidence and considered by the trial court." The petition is accompanied by a written stipulation signed by counsel for both parties to the effect that an assessment was in fact made for the year 1898, and that evidence of that fact was introduced at the trial in the District Court. The stipulation recites that the omission to include the same in the statement of case transmitted to this court was due to an oversight on the part of counsel for the appellant and respondent. Both parties request this court to consider the record as "amended and added to" so as to show the fact of the assessment, and also certain other facts, and ask us "to decide the said cause upon the merits as included in the entire record as so made." Briefly stated, we are requested to do two things: First, to permit the introduction of evidence in this court originally,

which is not certified here by the trial court; secondly, to retry the case upon the record as so added to. Neither request can be granted. The records upon which this court acts in the exercise of its appellate jurisdiction are made by the District Court, and it does not lie within the power of counsel or of this court to alter such records. The language of the Supreme Court of Nebraska in *Hoagland v. VanEtten*, 43 N. W. Rep. 422, is directly applicable. The court said: "The duty of settling bills of exception is imposed on the judge of the District Court before whom the cause was tried, and the Supreme Court must accept the bill certified to as correct. This court, in the exercise of its appellate jurisdiction, can take no action looking towards a correction of bills of exception wherein mistakes of the kind referred to in this motion and affidavit are alleged to have occurred. That duty devolves upon the judge of the District Court." In *Thuet v. Strong*, 7 N. D. 566, 75 N. W. Rep. 922, this court held "that the action of the court with respect to a review of a case cannot be controlled by counsel who, in a given case, see fit to ignore the statute and rules of court governing the settlement of statements of the case and the preparation of abstracts." Upon a proper showing and a timely application this court will transmit records to the District Court for correction. As was said in *Baumer v. French*, 8 N. D. 319, 79 N. W. Rep. 340, "Under certain circumstances the practice of sending down a record for amendment is entirely proper." See *Moore v. Booker*, 4 N. D. 543, 62 N. W. Rep. 607, and court rule 33 (74 N. W. Rep. xii). But the right to have the record sent back is not an absolute one. In *Coulter v. Railway Co.*, 5 N. D. 568, 67 N. W. Rep. 1046, the court, speaking through Corliss, J., said that: "After a case has been submitted to this court on the merits, and the work of investigation has commenced, parties will not be allowed the privilege of amending the record, except on condition of making a very satisfactory showing; and that showing must be made in this court, and this court will in all such cases determine whether, under the circumstances, the record should go back for correction." In this case we do not have occasion to decide whether, in any case, such correction can be made after decision filed. No request is made to remand the record to the District Court, where this power to correct alone exists. Respondent is content with asking an amendment at the hands of this court. This, of course, cannot be granted, and the petition for a rehearing must therefore be denied.

The real purpose of the request for a reargument and amendment of the record is to secure a decision on such questions as shall be decisive of the liability of some 1,300 other policy-holders in the defunct insurance company. Such a result, we can readily see, would be highly advantageous to respondent in his further duties as receiver. The questions involved, however, are of such importance that we cannot, with propriety, enter on a discussion thereof until they arise in an orderly and regular way.

(84 N. W. Rep. 369.)

SIMON RAVICZ vs. CLINTON G. NICKELLS.

Opinion filed November 20, 1900.

Action on Note—Pleading—Fraud—Burden of Proof.

In an action upon a negotiable note by an indorsee thereof, the mere allegation in the answer of fraud in the inception of the note does not throw upon plaintiff the burden of proving that he is a good-faith holder. That burden is thrown upon him only after the fraud has been established.

Answer—New Matter—Reply.

Where, in such an action the defendant sets up facts which constitute a claim in his favor for damages against the original payee in an amount in excess of the note, and asks to defeat a recovery upon the note by reason of such facts, the matter so pleaded is defensive merely, and requires no reply.

Party After Trying Case to Jury Can't Claim Equitable Relief.

Where a party sets forth facts by which he claims he has been damaged in a large sum, and goes to trial upon such facts before a jury, he cannot be heard, after verdict and judgment against him, to allege that the facts entitle him to equitable relief.

Appeal from District Court, Richland County; *Lauder, J.*
Action by Simon Ravicz against Clinton G. Nickells, administrator. Judgment for plaintiff, and defendant appeals.
Affirmed.

W. E. Purcell, for appellant.

The fact that the counterclaim is one for damages for tort, pleaded in an action on contract is immaterial. The question whether a counterclaim is proper or improper can only be taken advantage of by demurrer and not raised at the trial by motion. *First Nat. Bank v. Laughlin*, 4 N. D. 391, 61 N. W. Rep. 473. All defenses invalidating a contract which forms the subject-matter of an action, such as fraud, etc., are included under the general term "new matter." *New York Central Ins. Co. v. National Co.*, 20 Barb. 468; *Castree v. Gavial*, 4 E. D. Smith, 428; §§ 55 and 59, Chap. 113, Laws 1899. The counterclaim of the code being more comprehensive than set-off or recoupment authorizes resort by the defendant to causes of action not embraced in either of those defenses. *Vassar v. Livingston*, 13 N. Y. 248. It secures to defendant the full relief which a separate action at law or a bill of chancery would have secured him in the same state of facts. *Leavenworth v. Packer*, 52 Barb. 132; *Boston Silk & Woolen Mills v. Eull*, 37 How Prac. 299. Defendant pleaded facts sufficient to show that the note was obtained by fraud and that the consideration was illegal. This cast upon plaintiff the burden of showing that he was a holder in good faith, for value. *Cummings v. Thompson*, 18 Minn. 246. The prayer of the complaint is in effect for the cancellation of the note. If plaintiff obtained judgment against defendant for the amount of the note and

defendant obtained judgment against the plaintiff for the amount due on the note, this would amount to cancellation of the note, and defendant is entitled to a cancellation, although not in words asked for in his pleading. *Sigler v. Hidy*, 9 N. W. Rep. 374; *Smith v. Eals*, 46 N. W. Rep. 1110. Defendant had a present existing cause of action at the time suit was brought for the cancellation, surrender and possession of the note. That cause of action was connected with the subject-matter of this action, viz: the note itself. Replevin would lie for possession of the note. *Gray v. Shannon*, 7 Ia. 508; *Bush v. Broomes*, 125 Ind. 14; *Savery v. Hayes*, 2 Ia. 25; *Sigler v. Hidy*, 9 N. W. Rep. 374.

A. J. Bessie and L. B. Everdell, for respondent. (No. brief filed).

BARTHOLOMEW, C. J. Plaintiff brought this action to establish a claim against the estate of a decedent, pursuant to section 6407, Rev. Codes. There was a trial to a jury, and at the close of the testimony each party moved for a directed verdict in his favor. The court granted plaintiff's motion, and overruled that of the defendant. A motion for new trial was denied, and judgment entered upon the verdict. Defendant appeals.

The claim was upon a promissory note purporting to be executed by Maude D. Nickells to Daniel A. Bessie. Plaintiff claimed as the indorsee of said Bessie. By the answer the execution of the note by Maude D. Nickells, and the facts that she subsequently died testate, naming the defendant Clinton G. Nickells as the sole executor of her estate; that her will had been duly proved and admitted to probate in this state, and that the executor named had qualified and entered upon the discharge of his duties, and that the claim had been duly presented and rejected,—were admitted. Various defenses were pleaded, only two of which need be mentioned. Defendant pleaded fraud in the inception of the note, and also, and under the name of counterclaim, alleged that plaintiff was not a good-faith purchaser of the note, and that the payee, Bessie, fraudulently converted to his own use and embezzled an amount of property in excess of the note belonging to Maude D. Nickells, and for which he is indebted to the estate. The answer prays that the action be dismissed, and that defendant recover of the plaintiff the amount apparently due upon said note. At the trial the plaintiff introduced the note, bearing the indorsement of Daniel A. Bessie,—as to which no question is made in the case,—and rested. Defendant introduced no testimony. He urges that the court erred in directing a verdict for plaintiff, because it appears conclusively that plaintiff is not a bona fide holder of said note, and because there was an admitted counterclaim in the case. His first point seems to be based upon the proposition that, as he pleaded fraud in the inception of the note, plaintiff could not recover unless he proved as an independent fact that he was a good-faith purchaser. But such is not the law. Whether a technical good-faith holder or not, plaintiff is entitled to recover unless some defense to the note has been established. The mere allegation of

fraud throws no burden upon plaintiff. It must be proved. *Vickery v. Burton*, 6 N. D. 245, 69 N. W. Rep. 193, and cases cited.

To support the second point it is urged that the answer contained a counterclaim, to which no reply had been made, and hence it stood admitted. We think there was no counterclaim in the case, although the defendant so denominated it. We do not base this upon the fact that the matters pleaded arose in tort. That point could only be raised upon demurrer. See *Bank v. Laughlin*, 4 N. D. 391, 61 N. W. Rep. 473. But the claim set forth in the so-called counterclaim is based upon the torts of Bessie, and no cause of action in favor of the defendant's testatrix could possibly arise thereon against this plaintiff. However broad we make the definition of the word "counterclaim," the facts pleaded cannot avoid in this case, because, if they raise any liability, it is against another party. But an inspection of the answer shows clearly that the facts were not pleaded as a counterclaim. No affirmative judgment or relief as against plaintiff was asked. It was simply the ordinary case of seeking to defeat a recovery upon a note in the hands of an assignee. Undoubtedly, the pleading was vulnerable to a motion or a demurrer, but it was defensive merely, and not admitted by failure to reply. Defendant urges that, as the facts set forth in this portion of the answer would, if proven, defeat a recovery upon the note, they should be construed as an equitable counterclaim or cross bill for the cancellation of the note. The facts were pleaded at law, and damage to the estate of the deceased in the sum of \$2,000 predicated thereon. It is elementary that a party cannot pass from law to equity in any such manner. 11 Enc. Pl. & Prac. 896 et seq. But the facts pleaded would not entitle the defendant to a cancellation of the note even if held by the payee, Bessie. They furnish ground for an independent cause of action against Bessie, but could not defeat a recovery upon the note, even in his hands. There are other points made, but they have less merit than those already discussed. The judgment of the District Court is affirmed. All concur.

(84 N. W. Rep. 353.)

CURTISS SWEIGLE vs. J. C. GATES, et al.

Opinion filed October 23, 1900.

Taxation—Listing Property—Unknown Owners.

Action to quiet title, and construing section 1548 of the Compiled Laws: *Held*, that the requirements of said section, with respect to listing property for taxation, to the effect that the assessor shall list property in the name of the owner if known to him, and if not known to list the same to "unknown owners," is mandatory, and not merely directory.

Void Assessment Because Not in Name of Owner.

Held, that an attempted assessment of certain lots in the year 1887, under said section, the title to which is involved in this action, is

void for the reason that the assessor in listing said lots for taxation wholly disregarded said mandatory provisions of said section, and omitted to list the same in the name of the owner, or to "unknown owners," or to any person whomsoever.

Tax Deeds Voidable.

The county treasurer at the annual tax sale of 1888 sold the lots in controversy to satisfy the alleged taxes of 1887, which were based upon said attempted assessment, and subsequently, no redemption from such sale having been made, executed tax deeds of said lots based upon said sale, and delivered the same to these defendants. *Held*, that said tax deeds were executed and delivered without authority of law, and were voidable for that reason.

Voidable Tax Deed—Will Not Start Limitation.

Held, further, that such deeds being voidable for jurisdictional reasons, viz: for the non-assessment of the lots described in the same, were powerless to start the statute of limitations running, and hence that when the same were recorded they did not so operate, despite the fact that said deeds were recorded more than three years prior to the commencement of this action.

Notice of Tax Sale—Description of Property.

Said tax sale of 1888 was made pursuant to a published notice of sale, which is governed by section 1620 of the Compiled Laws of 1887. Said section required that the published notice should embrace "a list of the lands to be sold and the amount of taxes due." Upon the facts stated in the opinion, *held*, that said published notice did not embrace any description of the lots described in the tax deeds in question; and, accordingly, *held*, that the treasurer was without jurisdiction to sell said lots at said tax sale of 1888.

Tax Levy Void—Not Made in Specified Amounts.

The lots were again sold for taxes by the county auditor of Richland county at the annual tax sale made in the year 1892 for the alleged taxes thereon of the year 1891, and were never redeemed from such sale. On July 21, 1899, said county auditor executed and delivered to the defendants tax deeds of said lots based upon the sale of 1892, and such deeds were regularly recorded. It appears that the alleged taxes of 1891 are based upon an attempted levy of taxes made by the commissioners of Richland county at a meeting held on the first Monday in July, 1891, and that such levy was not made in specified amounts, as was required by the statute then in force. See section 6, chapter 100, Revenue Laws 1891. Said attempted tax levy was made pursuant to the provisions of section 1589 of the Compiled Laws, which section was not then in force. *Held*, that such attempted levy of the taxes of 1891 was wholly without authority of law, and that the sale made pursuant to such levy was made without jurisdiction to sell. Said last-mentioned tax deeds were made *prima facie* evidence of the regularity of all the tax proceedings, but such evidence was overcome and rebutted by the proof that the levy was void.

Appeal from District Court, Richland County; *Lauder, J.*
Action by Curtiss Sweigle against J. C. Gates and others. Judgment for defendants, and plaintiff appeals.
Reversed.

S. H. Snyder and Curtiss Sweigle, for appellant.

Defendants set up the statute of limitations, and also title in them-

selves, through tax proceedings. By pleading their tax titles defendants waived the defense of the statute of limitations and invited a trial upon the merits. *London, Etc., Co. v. Gibson*, 80 N. W. Rep. 205. At the time of the tax sale for the 1887 taxes section 1640, Comp Laws, was in force. This section was repealed by section 72 of the Revenue Law of 1890, and before defendant's 1887 tax deeds were recorded. The statute of limitations was repealed by the repeal of § 1640, Comp. Laws. *Shattuck v. Smith*, 6 N. D. 56, 69 N. W. Rep. 12. Section 1640, Comp. Laws was re-enacted in § 1269, Rev. Codes of 1895, which repealed § 72 of the 1890 Revenue Law. This suit was begun less than three years after § 1269 went into effect. The statute of limitations cannot run, though the deed is recorded, until there is a right of action for it to run upon. So long as the owner is in possession and keeps it the statute does not run against him but runs against the purchaser. *Blackwell on Tax Titles*, 838; *Baldwin v. Merriam*, 20 N. W. Rep. 250. The tax deed is without any seal of the treasurer affixed, and is not in the form prescribed by § 1639, Comp. Laws, and is void upon its face. *Black on Tax Titles*, 211; *Blackwell on Tax Titles*, 773; *Eaton v. North*, 20 Wis. 449; *Sturdevant v. Mather*, 20 Wis. 576; *Sullivan v. Merriam*, 20 N. W. Rep. 118; *Bendickson v. Fenton*, 31 N. W. Rep. 685; *Salmer v. Lathrop*, 72 N. W. Rep. 570; 25 Enc. 691, note 5. The fact that the law does not specifically provide the treasurer with an official seal does not excuse the absence of such a seal from the tax deed. *Bendickson v. Fenton*, 31 N. W. Rep. 685. The lots were not assessed to the owner in 1887, nor to unknown owners. The requirement that the property be assessed to the owner or unknown owner is mandatory and jurisdictional. *Black on Tax Titles*, 37; *Lague v. Boagni*, 32 La. Ann. 913; *Davenport v. Knox*, 34 La. Ann. 408; *Roberts v. First National Bank*, 8 N. D. 504, 79 N. W. Rep. 1052; *Blackwell on Tax Titles*, 929; *Milwaukee Iron Co. v. Hubbard*, 29 Wis. 51; *Himmelman v. Steiner*, 38 Cal. 175; *Abbott v. Lindenbower*, 42 Mo. 162; *People v. Castro*, 39 Cal. 65. The board of equalization raised the property valuation without notice to the owner. § 797, Comp Laws; *Power v. Larrabee*, 49 N. W. Rep. 734, 2 N. D. 141. The school tax was levied by percentages, the levy was not based upon estimates of the city auditor. § 922, Comp. Laws; *Wells County v. McHenry*, 7 N. D. 246, 74 N. W. Rep. 241; *Shattuck v. Smith*, 6 N. D. 56, 69 N. W. Rep. 10. The owner did not have full sixty days notice of the expiration of the redemption and the deed is void for uncertainty in that it is in the alternative, to-wit: "Time for redemption will expire December 31st or within sixty days after the service of this notice." *Clary v. O'Shea*, 75 N. W. Rep. 115; *Peterson v. Mast*, 63 N. W. Rep. 168. The law in force when the deed was applied for, governed. Hence, notice of the expiration of redemption was necessary. *Callahan v. Sweeney*, 21 Pac. Rep. 960. Where notice of redemption is not given the statute of limitations does not run in favor of the tax deed. *Slyfield v. Barnum*, 32 N. W. Rep. 270.

Receipts for subsequent taxes paid are not evidence, and defendants cannot recover the same without first providing that the taxes were legal. *O'Neil v. Tyler*, 3 N. D. 47, 53 N. W. Rep. 434.

Davis, Lyon & Gates, for respondents.

Appellant seeks under § 5630, Rev. Codes, to have the entire case reviewed in this court. He has not made a specification of particulars in the stated case, nor has he specified the questions of fact that he desires reviewed. The demand for a review of the entire case does not relieve appellant from the necessity of specifying the questions of fact to be reviewed. *Rick v. Bergsvendson*, 8 N. D. 578; *Hayes v. Taylor*, 9 N. D. 92, appear to hold to the contrary, but such holdings were unnecessary to the decision of said cases. The pretended settlement of a case by the trial court after appeal is void. *Carmichael v. Vandeburr*, 51 Ia. 225; *Moore v. Booker*, 4 N. D. 543, 62 N. W. Rep. 607. The tax deeds for 1887 were valid on their face. There was an assessment, meeting of the board of equalization at the proper time, a levy and sale. *Roberts v. Bank*, 8 N. D. 504, 79 N. W. Rep. 1040. The tax deeds are conclusive evidence of the regularity of all proceedings, excepting as to the objections raised in the pleadings. *Roberts v. Bank*, 8 N. D. 504; *Larson v. Dickey*, 58 N. W. Rep. 167. The deeds were recorded February 6th, 1891, and § 1640, Comp. Laws, governs as to the time within which an action can be brought. *Meldahl v. Dobbin*, 8 N. D. 115, 77 N. W. Rep. 280; *Roberts v. Bank*, 8 N. D. 504. This section was not repealed by § 72, chap. 132, Laws 1890, because said section refers to sales made pursuant to said act, and said act is prospective in its operation. *Wells County v. McHenry*, 7 N. D. 246, 74 N. W. Rep. 241. By alleging title in themselves and praying that they be adjudged the owners in fee of the premises, defendants have not waived the defense of the statute of limitations. In this state as may defenses are allowed to be pleaded as the defendant may have. § 5274, Rev. Codes; *Stebbins v. Larder*, 48 N. W. Rep. 847; *Lawrence v. Peck*, 54 N. W. Rep. 808; *Green v. Hughitt*, 59 N. W. Rep. 524; *Nollman v. Evenson*, 5 N. D. 344, 65 N. W. Rep. 686. The absence of any verification of the assessment roll does not invalidate the assessment. *Farrington v. Assessment Co.*, 45 N. W. Rep. 191; *Avant v. Flynn*, 49 N. W. Rep. 15; *Twinting v. Finley*, 75 N. W. Rep. 548. The lots not having been assessed to any person the assessment is presumed to be made to unknown owners. *Burdick v. Connell*, 69 Ia. 458. The unlawful action of the board of equalization cannot be made the basis of relief in equity, it occurred in the determination of a question of which the board had jurisdiction and will stand until corrected in a proper proceeding. *Railway Co. v. Seward*, 10 Neb. 211, 4 N. W. Rep. 1016; *Miller v. Hurford*, 10 Neb. 13, 12 N. W. Rep. 832; *Clarke v. Board*, 50 N. W. Rep. 615; *Pennsylvania Co. v. Crystal Falls*, 27 N. W. Rep. 6; *Lawrence v. Janesville*, 50 N. W. Rep. 1102; *Nugent v. Bates*, 50 N. W. Rep. 76; *Harris v. Freemont County*, 19 N. W.

Rep. 826; *Pierre Water Works Co. v. County*, 5 Dak. 145. Where in fact an assessment levy and sale have been made the deed becomes conclusive evidence that all the attending steps were regular. *Bulkely v. Callahan*, 32 Ia. 461; *Eldridge v. Kuehl*, 27 Ia. 160; *McCreedy v. Sexton*, 29 Ia. 356; *Martin v. Cole*, 38 Ia. 234; *Ware v. Little*, 35 Ia. 234. Notice of expiration of time of redemption was unnecessary because the notice is required to be given the person in whose name the lands were assessed, and it would be an idle act to give notice to an unknown owner. *Tuttle v. Griffin*, 64 Ia. 455; *Chambers v. Haddock*, 64 Ia. 556; *Meredith v. Phelps*, 65 Ia. 118; *Walker v. Towne*, 65 Ia. 563; *Burdick v. Connell*, 69 Ia. 458. Notice was unnecessary because the law extending time for redemption does not apply to sales made prior to the passage of the act. *State v. Fylpaa*, 54 N. W. Rep. 599.

WALLIN, J. This action is brought to quiet the title to three city lots located in R. S. Tyler's addition to the city of Wahpeton. The District Court entered judgment in favor of the defendants, dismissing the action, with costs, and quieting the title in the defendants. Plaintiff appeals from such judgment to this court, and in the settled statement of the case plaintiff has demanded a retrial in this court of all the issues involved. The complaint alleges, in effect, that the plaintiff is the owner of the lots in question, and that the defendants claim some interest in the lots adversely to the plaintiff, and asks that the title be quieted in the plaintiff. Defendants answer jointly, and deny the plaintiff's ownership, and allege ownership in themselves. The answer further sets out the defendants' sources of title, and alleges, in substance, that the defendants became seised of their title under certain tax deeds running to the defendants, and which were executed and delivered to the defendants pursuant to certain tax sales made in Richland county, and that said deeds were so made and delivered, respectively, by the county treasurer and the county auditor of the county of Richland, as is hereinafter more particularly explained. The answer further pleads the statute of limitations in bar of the action, and in this behalf alleges that three of said tax deeds, one for each lot, were based upon the annual tax sale of 1888 for the taxes of 1887; that such deeds are dated on January 2, 1891, and were duly recorded on February 6, 1891, and that this action was not commenced until more than three years had elapsed after said deeds were recorded, and not until December, 1898. These deeds were executed and delivered by the county treasurer of Richland county. The answer further sets out, as a source of defendants' title, three other tax deeds, one for each lot, executed and delivered by the county auditor of Richland county. These last-mentioned deeds are based upon the tax sale of 1892 for the taxes of 1891, but were not issued or delivered until July 1, 1899. To each of the three tax deeds first above mentioned,—those based upon the sale of 1888,—when offered in evidence, plaintiff objected upon the ground that they were incompetent, irrelevant, and im-

material, and upon the specific ground that the treasurer was without legal authority to issue the same. Other specific grounds of objection to the deeds were stated, to which we shall not have occasion to refer.

We will first notice defendants' contention that the three-years statute of limitations, embraced in section 1269, Rev. Codes 1895, operates to bar this action. This question, in view of the very frequent and radical changes made in the revenue laws, presents considerable difficulty; but we have reached the conclusion, at least for the purposes of this case, that said section operates as a bar to this action, if the tax deeds now under consideration when recorded had the effect to start the statute running, and this question in its final analysis depends upon whether the county treasurer, who executed and delivered the deeds, had jurisdiction so to do. It is well settled that tax deeds which upon their face are void for jurisdictional reasons do not operate to start a limitation statute running; and it is also well settled, both upon principle and authority, that, where an officer executing a tax deed was without jurisdiction so to do, such deed will not start the limitation running, even if the deed be entirely regular upon its face. In other words, the want of legal authority to execute a tax deed may be demonstrated either by jurisdictional defects upon the face of the deed, or by evidence *aliunde*, showing such jurisdictional defects in the tax proceedings upon which the deed issues as are under the law fundamental to the tax.

What particular tax proceedings are deemed to be jurisdictional to a sale of land for taxes must in all cases depend vitally upon the terms of the laws under which a tax is sought to be assessed, but it is entirely safe to say that, under a system of taxation which is based upon an official assessment or valuation of property, no tax can be lawfully laid until the valuation has been made in substantial conformity to the statute governing such valuation. This court very recently had occasion to consider a tax deed based upon a tax sale made by the county treasurer, and resting upon a sale for the taxes of 1888. The deed in that case was considered with reference to the statute of limitations, and embraced substantially the same language as that found in the deed we are now considering. See *Roberts v. Bank*, 3 N. D. 504, 79 N. W. Rep. 1049. Commenting in that case upon the necessity of an assessment as a proceeding essential to a tax, this court said: "An assessment is, in the broadest sense, a jurisdictional requirement." In the case cited the fact of non-assessment did not appear upon the face of the deed, and yet the court held in that case that the deed was utterly void, and did not set the statute of limitations running. See authorities cited in the opinion. In that case there was not a total failure to assess. The defect there was that the sale of one-half of a lot was made to satisfy a tax based upon an assessment of the whole lot, but the case is authority for the proposition that an assessment must be a

legal assessment, and one that will justify the sale, and that it is not enough to show merely that an assessment, however illegal, has been made in fact. It has become elementary in tax proceedings that an assessment, in order to be valid, must be made substantially in accordance with the statute governing the assessment. True, certain of the directions of such a statute which are intended merely to secure order and system in the dispatch of business, and which cannot injuriously affect the interests of a taxpayer, are usually held to be merely directory, and their non-observance, therefore, will not invalidate an assessment; but, on the other hand, where statutory requirements are clearly intended for the protection of the citizen and taxpayer, such provisions are uniformly held to be mandatory, and their disregard will defeat the validity of the assessment. See Cooley, Tax'n, pp. 284, 285, and cases cited; 1 Desty, Tax'n, § 106.

In this case the contention is made that the treasurer was without authority to issue the tax deeds based upon the sale of 1888, and this contention rests upon the ground that the assessment of 1887 was illegal and void. The assessment roll for 1887 was put in evidence, and from it it appears that the lots were not assessed in the name of the owner, and further, that they were not assessed to "unknown owners." The column in the form of the return prescribed in the statute intended to be filled with owners' names, and headed "Owner," was left entirely blank in the space opposite the descriptions of all the lots. The assessment was governed in this feature by section 1548 of the Compiled Laws of 1887, which contains the following provision: "If the name of such owner be known to the assessor the property shall be assessed in his, her, or their name, if unknown to the assessor, the property shall be assessed to 'unknown owners.'" It is obvious, therefore, that this provision of the statute was wholly disregarded by the assessor, and the pivotal question upon this point is whether this statutory provision is mandatory, or whether the same is merely directory; and the solution of this question, under well-established rules of construction, will depend upon the further inquiry as to whether this feature of the statute was intended simply to facilitate the orderly dispatch of official business, or, on the other hand, its purpose was to throw around the taxpayer an additional safeguard.

We are of the opinion that this statute was passed wholly in the interest of the taxpayer, and therefore that the same is mandatory in its requirements. Under the statute, the taxpayer is advised that his name will appear opposite a description of his property in the tax return required to be made to the county auditor, unless it appears by an official statement written opposite such description by the assessor that the name of the owner is unknown. The requirement that the owner's name must be stated, when known to the assessor, is not more explicit than that which requires the assessment to be made to "unknown owners" in cases where the assessor is not advised and does not know the name of the owner. It does not at all satisfy the mandate of this statute to omit all

reference to a name in any case because the law specifically requires affirmative action on the part of the officer in all cases, and whether the name is or is not known to him. There is authority, based upon obviously sound reasoning, to the effect that where the law requires an assessor to list property in the name of the owner, if known, he will be presumed to have done his duty in cases where he omits the owner's name. The name being omitted, it will be assumed that the name of the owner was unknown to the officer, and hence was properly omitted from the return. But, under the statute controlling this assessment, such a rule could not apply, because the statute requires affirmative action in cases where the owner's name is unknown to the officers.

The taxpayer, finding no entry at all in the return in the column headed "Owner," has, in our opinion, the best of reasons for assuming that his lands are not included in such an assessment, and are not, therefore, lawfully assessed by such a return. See *Smith v. Davis*, 30 Cal. 537; *Smith v. Cofran*, 34 Cal. 310; *Himmelmann v. Steiner*, 38 Cal. 175; *Hewes v. Rees*, 40 Cal. 255; *Weltz*, Assessm. § 65. See *Desmond v. Babbitt*, 117 Mass. 233; *Abbott v. Lendenbouer*, 42 Mo. 162. In the case last cited the court uses this language: "The assessors have no jurisdiction to assess property otherwise than as the statute prescribes, and a void assessment (which is equivalent to no assessment at all) against the owner cannot be made the foundation of a sale and conveyance of his land even by legislative enactment." In this case the court held that a tax deed may by legislation be made prima facie evidence of title, but cannot be made conclusive as to matters which are essential to the exercise of the taxing power, and it is held, further, that an assessment is essential to a tax. Counsel for defendants cite *Burdick v. Connell*, 69 Ia. 458, 29 N. W. Rep. 416, and other Iowa cases, in support of the assessment in the case at bar. These cases are not cases directly involving the validity of assessments, and hence are not strictly in point; yet it will be conceded that the reasoning of the cases, if applied to an assessment, would support defendants' contention. We deem it to be our duty, nevertheless, to take the opposite view, and in doing so we have no doubt that our conclusions can be sustained on principle, and by a decided preponderance of judicial opinion.

The trial court found that an assessment in fact was made in 1887. We cannot, under the authorities, yield assent to this statement. No assessment which disregards provisions of law made solely for the protection of the taxpayer is a valid assessment, and hence such an assessment cannot be lawfully regarded as an assessment in fact. An assessment in fact which is not a legal assessment is a legal impossibility. True, the legislature had authority to declare by statute that an error in listing for taxation as to the name of the owner or any omission in this respect should not defeat the assessment, but no such curative statute existed when the assessment of

1887 was made. Section 1641, Comp. Laws, has no application to the facts in this record. Finally, upon this point, we hold that to give validity to the deeds in question would operate to deprive the plaintiff of his property without due process of law. The evidence discloses other serious defects in the assessment of 1887, but these need not be particularly discussed.

Turning, now, to the pretended tax sale upon which the deeds were issued,—the sale of 1888,—it is further contended that the sale was without legal authority, and gave the treasurer no jurisdiction to issue the deeds, for the reason that the notice of sale was vitally defective, in this: that the notice did not contain a description of the lots in question or either of them. That a sale actually made, but made without legal notice, in a case where the law requires notice, is invalid, and confers no authority to issue a tax deed, is elementary. Such a mode of transferring title to real estate would amount to confiscation, and is not tolerated by the law. The omission of a valid notice of sale is not, therefore, a mere irregularity of procedure which may be cured. See Black, Tax Titles (2d Ed.) § 205. The notice of the sale, as published, was put in evidence by the plaintiff, and the defect relied upon has reference to the description of the lots. The notice stated, in effect, that the property to be sold consisted of real estate situated in the county of Richland, "described as follows." The particular descriptions were set out in the manner following:

"Description.	Sec.	Acr.	Amt.
"Eagle Township 1887."			

Following this heading are several columns of descriptions of farm lands situated in townships. The first description of city or town lots in the notice begins with the following heading: "Village of Lidgerwood." Under this appears the heading "Lot," "Block." Under these headings were several columns, containing descriptions of town lots, and these continue, until we find the following heading in the notice: "R. S. Tyler's Addition." Under this heading we find the following:

"Lot.	Blk.	Amt.
4	2	4 08
5	"	4 08
6	"	4 08"

Unless the property in suit is described in the above description, the same is not described at all in the notice of sale. We are compelled to hold that the notice is wholly insufficient and void. The lots described in the pleadings and in the tax deeds are situated in "R. S. Tyler's addition to the city of Wahpeton." We find no such lots described in the published notice. The description of city or town lots, as has been shown, begins with the village of Lidgerwood, and under this heading a large number of city lots are described by lots and blocks. Next following such descriptions we find the heading, "R. S. Tyler's Addition." This heading, when considered in

connection with the lot numbers and block number, as above set out, fails entirely to locate or describe the lots in question. There is nothing whatever in the notice to indicate that the lots numbered below this heading are situated in R. S. Tyler's addition to the city of Wahpeton. On the contrary, the words "R. S. Tyler's Addition," standing alone, wholly fail as a description of real property; but in this case these words seem to fairly connect themselves with the description which is named next above the words "R. S. Tyler's Addition," viz: with the "Village of Lidgerwood." The entire notice, when most liberally construed, therefore declares that the lots attempted to be described are situated in R. S. Tyler's addition to Lidgerwood, and that such addition to Lidgerwood is within the county of Richland.

We will now proceed to consider the series of tax deeds issued to the defendants by the county auditor of Richland county, and bearing date the 21st day of July, 1899. These deeds purport to convey the lots above described, and are based upon a tax sale for the taxes of 1891. As to this series of deeds no question arises under any statute of limitations, and the only question which we deem it necessary to discuss or pass upon relates to the tax levy made by the county commissioners in the year 1891. We here quote from the abstract all the evidence bearing upon such levy which is found in the record:

"Plaintiff introduced in evidence commissioners' record of Richland Co., a record of the auditor's office, and particularly page 400, to show levy for 1891, which reads as follows:

"On motion, the county board made the following levy for the year 1891:

For Co. revenue fund.....	5	mills.
" road and bridge fund.....	1	"
For sinking and int. fund.....	1/2	"
Total	6 1/2	mills.

"The levy of the county revenue fund was based on the following estimated expenses for the ensuing year:

District attorney.....	\$ 1,100
County surveyor.....	50
County commissioners.....	1,750
Stenographer	300
Justice court.....	1,000
Books and stationery.....	1,800
Light, fuel, and repairing court house.....	1,500
Miscellaneous	2,000
Sheriff office.....	2,500
Coroner	400
Clerk of court.....	1,000
District court.....	4,000
Election expenses.....	1,000
Printing and advertising.....	1,500
Hospital and Co. poor.....	4,000
For redemption and interest outstanding warrants.....	3,400
Total	\$27,000

"Five mills valuation of \$5,500,000..... \$27,500"

The question of law arising upon the testimony above set out is whether the attempted tax levy constituted a valid levy. A solution of this inquiry involves a consideration of the law regulating tax levies for counties which was then in force. The levy was governed by the provisions of the revenue law of 1890, and particularly section 48 of that enactment, as amended by section 6 of chapter 100 of the Laws of 1891. We first call attention to the following language of said section: "The county taxes shall be levied by the county commissioners at the time of their meeting in July of each year." The July meeting of the board occurred at that time on the first Monday in July. Comp. Laws 1887, § 579. Under section 44 of the 1890 tax law, the county board of equalization, consisting of the commissioners and county auditor, were required to assemble annually on the second Monday of July. After the county board of equalization completed its duties, the county auditor was required to send an abstract of the equalized tax lists to the state auditor on or before the 4th day of August in each year. Section 45, *Id.* After the action required to be taken by the state board of equalization is completed, the law required that the rate per centum shall be based by the auditor upon the valuation as finally fixed by the state board of equalization. Section 48, as amended. We call attention to these provisions of the acts of 1890 and 1891 for the purpose of showing that in the year 1891 the law required county taxes to be levied in advance of any action which could lawfully be taken by either the county or state board of equalization, and hence such levy could not lawfully be based upon any per cent. of the valuation made for the same year. The valuation itself was a later act than the levy; and hence to base a levy upon such valuation was a physical, as well as a legal, impossibility. Nevertheless the evidence shows that the commissioners in the year 1891 attempted to levy the county taxes for that year upon a basis of percentage. They resolved to levy five mills for county revenue, one mill for road and bridge fund, and one-half mill for sinking and interest fund. Thus it appears that the amount of money which would be realized from this attempted tax levy was wholly problematical, and would depend entirely upon the total equalized value of the taxable property, which value could not be ascertained until a date much later than the levy. But turning to section 6, Act 1891, we find that it plainly required that all county taxes should be levied in "specific amounts." This provision embraces a radical change in the mode of levying county taxes from that existing under the Compiled Laws. See sections 1589, 1591, Comp. Laws. Under the old system, the commissioners based their levy upon an equalized valuation, and did not meet to make such levy until the first Monday of September (sections 1590, 1591), prior to which time the action of the state board was certified to the county auditor. Again, section 6 of the act of 1891 requires not only that local taxes should be levied in specific amounts, but that such levies, as to county taxes, should be based upon "an itemized statement of the county expenses

for the ensuing year." This record shows that the itemized statement required was made and spread upon the record, but there was no attempt made to levy any tax whatever in a specified amount. On the contrary, the only language relating to any levy shows unmistakably that the commissioners were acting, or attempting to act, under the pre-existing statutes, and were attempting to levy a tax based upon percentages. The levy attempted to be made was in mills, and this would be meaningless, unless the language is considered in connection with some established basis of value. It is obvious, therefore, that the mode of levying the tax for 1891 was not only without authority of law, but was directly contrary to positive and plain provisions of the statute controlling the levy. The right to levy a tax is conferred by law upon county commissioners, but this right is carefully limited, and the mode of making the levy is detailed in the statute which delegates the right. Under the authorities, the manner or mode of making the levy is an essential part of the law, and must not, therefore, be radically departed from, but must be substantially adopted by the subordinate body to whom the right to levy is delegated. This court has passed upon the precise question presented in this branch of the case. See *Wells Co. v. McHenry*, 7 N. D. 246, 260-262, 74 N. W. Rep. 241. This case will be ruled by the case last cited, and hence we shall hold that the levy for the taxes of 1891, and upon which the 1899 deeds are based, was wholly void, and not merely irregular. There was therefore no jurisdiction in the county auditor to issue said last-mentioned deeds, and the same are therefore without effect, and convey no title to these defendants.

Respondents' counsel have made certain preliminary objections to any retrial of this case in this court, which objections are based upon alleged defects in the statement of the case and in the service of an abstract. We have considered said objections, and the same are overruled.

It follows from what has been said that the judgment of the trial court must be reversed, and the court below is directed to reverse its judgment herein, and enter a judgment in plaintiff's favor, vacating all of said tax deeds, and quieting the title to the lots in question in the plaintiff, as demanded in the complaint. The plaintiff will recover his costs and disbursements in both courts. All the judges concurring.

ON PETITION FOR REHEARING.

A carefully prepared and elaborate petition for rehearing has been filed in this case. The case was originally presented by foreign counsel, but since the decision in this court local counsel have been employed, and the greater part of the petition for rehearing was evidently prepared by local counsel. In so far as the petition relates to questions passed upon in the opinion handed down, we adhere to our rulings. Much of the petition, however, is devoted to grave and complicated jurisdictional and constitutional questions that were

in no manner presented to the trial court or to this court upon the argument, and we desire to take this occasion to condemn a practice that has become far too prevalent in this state, not that this case is more, or as much, open to the censure, as many other cases that we are required to consider, but because we desire the bar of the state generally to understand that it will hereafter be the rule of this court, from which departure will be made only in extreme cases, that no question will be considered upon a petition for rehearing that was not presented on the argument or decided in the opinion of the court. Our reason for the rule cannot be better stated than by quoting from adjudicated cases, citing first the language of Chief Justice Murray in *Andrews v. Hill Co.*, 7 Cal. 334: "This case may be said (without any disrespect to the counsel for the respondents) to be a fair illustration of a most pernicious practice which has sprung up among the bar in many instances, of presenting cases without that care and examination of the record which is necessary to a correct understanding of the case, and afterwards trusting to the indulgence of the court by way of a petition for a rehearing. In fact, so common has the practice become that the idea that a reargument will be granted as a matter of course seems generally to obtain, and petitions are filed in almost every case that is decided. I have had occasion to observe in the last two years that the best, and in many instances the only, arguments which were made in cases before us were in the form of petitions for rehearing. Such a practice does great injustice to the bar and the court, and frequently imposes upon us double labor, besides giving to the decisions a seeming contradiction." And in *Dougherty v. Henairie*, 49 Cal. 686, which was an attack upon a tax deed, the court said: "The sufficiency of the deed in this particular not having been questioned at the argument or in the briefs of counsel, we decline to consider the point now. The proper dispatch of the business of the court requires that counsel should state the grounds on which they rely in their briefs, and not reserve other points to be set up in a petition for a rehearing, after a decision of all the cause." In *Ramsey v. Barbaro*, 12 Smedes & M. 209, the court said: "We cannot grant rearguments on points or questions not raised in the first argument or assigned for error. This would be tolerating experiments on the judgment of the court, and trying cases by halves." In *Knoth v. Barclay*, 8 Colo. 306, 7 Pac. Rep. 289, the court said: "It is the duty of counsel to present all questions upon which they rely in their briefs and arguments in the first instance, and the court, in reviewing the cause, does not usually go beyond the subjects to which its attention is thus invited. It would be obviously unfair to permit the presentation of such questions as the one now before us at this stage of the proceedings. Counsel are not permitted to present part of their case at the formal submission, and the remainder upon the petition for a rehearing." See, further, *Rogers v. Laytin*, 81 N. Y. 642; *Weil v. Nevitt*, 18 Colo. 17, 31 Pac. Rep. 487; *U. S. v. Hall*, 11 C. C. A. 294, 63 Fed. Rep. 475;

Tolman v. Bowerman, 6 S. D. 207, 60 N. W. Rep. 751. Petition denied.

(84 N. W. Rep. 481.)

H. D. SCOTT vs. ALBERT E. JONES.

Opinion filed November 9, 1900.

Trustee—Error of Judgment—Liabilities.

A trust deed declared that the trustee should not be liable for errors or mistakes of judgment in the execution of the trust. In an action subsequently brought by the trustor against the trustee for an accounting, the court found the trustee delinquent in his accounts in a certain sum, but found that the trustee had been guilty of no dishonest act, and the delinquency was the result of accident, error, and misadventure in the conduct of the trust business. *Held*, that there was no liability on the part of the trustee.

Appeal from District Court, Cass County; *Pollock, J.*

Action by H. D. Scott, trustee in bankruptcy for G. A. Grover, against Albert E. Jones. Judgment for plaintiff. Defendant appeals. Modified.

John E. Greene, for appellant.

Morrill & Engcrud, for respondent.

BARTHOLOMEW, C. J. In 1894 G. A. Grover was doing a general merchandise business at Horace, in Cass county, N. D. On December 19, 1894, he executed a deed of trust of all his property to one Albert E. Jones, for the benefit of his creditors. The deed was executed by Grover, as trustor, and Jones, as trustee, and the creditors of Grover, as beneficiaries. This same deed was before us in *Mercantile Co. v. Grover*, 7 N. D. 460, 75 N. W. Rep. 911, 41 L. R. A. 252. Pursuant to the deed, Jones took possession of the property, and proceeded with the execution of his trust. In February, 1897, the trustor brought an action against the trustee to compel an accounting, claiming that said trustee was converting the property to his own use, and not properly accounting for the same. Grover being subsequently adjudged a bankrupt, his trustee, H. D. Scott, was substituted as plaintiff. There was an answer in full denial of this claim. The trial resulted in a judgment against Jones for \$1,000, and he appeals.

None of the testimony was brought upon the record. The trust deed was made a part of the complaint, and is before us. Appellant urges but one ground for reversal, and that is that the finding of fact does not warrant the conclusions of law. We think the point must be sustained. In the trust deed we find this provision: "The said party of the second part hereby accepts said trusts, and covenants with the said party of the first part, and with each of the parties of the third part, that he shall and will faithfully execute the several trusts hereby established: provided, however, that said party of the second part shall not be liable for errors or mistakes of judg-

ment in the execution thereof." "The court finds that Jones was indebted to the estate in the sum of \$2,492.89, but that the estate was indebted to him in the sum of \$1,492.89, leaving a balance of \$1,000, for which judgment was ordered. The twenty-first finding of fact reads: "That said Jones failed to keep proper books of account of his transactions as such trustee. That he kept books of account under a system of double-entry bookkeeping, but the entries therein were so carelessly and improperly made that the books do not show a true record of his business. But the court expressly finds that, in its judgment, from the evidence, defendant, Jones, has not been guilty of any dishonest acts; any delinquency arising being the result of accident, error, and misadventure in the conduct of the business." It is clear that from the books kept by the trustee, or from evidence *aliunde*, or from both, the court was able to state to a penny the condition of the account of the trustee, because he finds the exact balance. It is certain, then, that no loss occurred to the estate by reason of careless or negligent bookkeeping. The finding quoted expressly declares that the trustee had been guilty of no dishonest acts, and that the delinquency was the result of accident, error, and misadventure in the conduct of the business. But, in our judgment, that is exactly the character of delinquency from which the trust deed relieved the trustee when it declared that he should not be held liable for errors or mistakes of judgment in the execution of the trust. Judgment on the findings should be entered dismissing the action as to the defendant Jones. It is so ordered. Reversed. All consur.

ON PETITION FOR REHEARING.

A petition for a rehearing in this case having been presented, it becomes necessary, by reason of the matters therein brought to our attention, to add to what we have already said. It is urged upon us that we have placed a wrong construction upon the findings of the trial court. We cannot so view it. "The court found that Jones was short in his accounts as trustee in the sum of \$2,492.89. It also found that the value of his services as such trustee was the sum of \$1,492.89, leaving a net shortage of \$1,000, for which judgment was entered. It necessarily follows that, except as to this amount of shortage, the accounts of the trustee were correct. He had not otherwise been delinquent,—there was no other "delinquency;" and when the court, in its findings said, "Any delinquency arising being the result of accident, error, and misadventure in the conduct of the business," the language necessarily referred to this particular shortage for which judgment was rendered. There was nothing else to which it could refer. We are now informed that objection was made to the incorporation of this matter in the finding. It was argued before the trial court, and its incorporation was advisedly made. We are further informed by this application for a rehearing that counsel for respondent were well advised before the convening of this term of this court that appellant would insist upon

the construction of the findings that this court places thereon. Yet counsel rested content with the findings as they stood, and did not place respondent in any condition to obtain relief therefrom. But it is now urged that the court below did not so intend to find, and we are asked to remand the record for correction. Even if counsel have not, by laches, lost the right to urge this matter, we cannot grant it. Under Sup. Ct. Rule No. 33 (74 N. W. xii) we may remand a record when there is a defective return; that is, we may remand a record, as prescribed in the rule, to have it corrected to correspond with the record which was in fact made in the court below. Further than this our decisions have never gone. See opinion on rehearing in *Moore v. Booker*, 4 N. D. 554, 62 N. W. Rep. 607; *Coulter v. Railway Co.*, 5 N. D. 568, 67 N. W. Rep. 1046; *Baumer v. French*, 8 N. D. 325, 79 N. W. Rep. 340. These cases show that this court will not remand a record for the purpose of having any matter inserted therein that does not appear in the record of the lower court as it stood when the appeal was taken, unless proceedings that were actually had in the lower court, and by inadvertence omitted from the record. But it is conceded that the record in this court entirely corresponds with the existing record in the trial court, and that such record was advisedly made. It is obvious that the real purpose is to have this court remand the record and reinvest the jurisdiction of the District Court, to the end that such court may make new findings that will support the judgment ordered. We know of no authority or practice in this state that will permit us so to do. The petition for a rehearing is denied. But inadvertently the order heretofore made in the case was too broad. We ordered the action dismissed. That was a mistake. The decree provided for things other than the recovery of the \$1,000, and as to such other matters no appeal was taken. Our former order is vacated, and the lower court is directed to modify its decree by omitting therefrom the judgment for \$1,000, and as thus modified the decree will stand. Appellant will recover costs in this court. Modified and affirmed.

(84 N. W. Rep. 479.)

SECURITY IMPROVEMENT COMPANY, *et al* vs. CASS COUNTY.

Opinion filed November 10, 1900.

Appeal—Retrial Not Demanded in Statement.

This action is brought to quiet title to plaintiff's real estate, and plaintiff is seeking to annul certain taxes assessed against said real estate, and to cancel certain tax sales thereof. The case was tried to the court, and the trial court filed its findings of fact and conclusions of law; and pursuant thereto judgment was entered canceling some of said taxes and tax sales, and adjudging that other taxes and tax sales involved were in all respects valid and regular. Plaintiff has appealed to this court from such judgment. A statement of the case was settled in the trial court, which contained all the evidence; but such statement did not embrace a demand for a retrial in this court of the entire case, or of any fact in the case. *Held*, that this court is, under

section 5630, Rev. Codes 1899, precluded from a retrial of any fact in the case, nor can this court consider the evidence for any purpose.

No Demand for Retrial of Any Fact—Affirmance.

There was some oral evidence submitted to the trial court, but the major part of the evidence consisted of records and other matters relating to the assessment and levy of the taxes, and to the validity of the tax sales. All of the evidence not oral was stipulated to be correct by counsel, and the same is undisputed evidence. Appellant's counsel bases his contention in this court upon the evidence, and argues that upon such undisputed evidence the trial court erred in concluding, as an ultimate fact, that the taxes now involved were lawfully assessed and levied, and erred in its conclusion that the tax sale here involved was a valid sale. *Held* that, inasmuch as counsel has not demanded a retrial of the facts or of any fact in issue, this court is precluded from considering the evidence to ascertain whether the trial court did or did not err in its findings of ultimate fact.

No Specification in Statement.

Counsel has not called the attention of this court to any error appearing upon the face of the judgment roll proper. Accordingly, *held*, that the judgment, which is presumptively valid until the contrary appears, must be affirmed.

Appeal from District Court, Cass County; *Pollock, J.*
Action by the Security Improvement Company and others against Cass County. Judgment for defendant, and plaintiffs appeal.
Affirmed.

J. E. Robinson, for appellants.

Morrill & Engerud, for respondent.

WALLIN, J. This action is brought to quiet the title to certain parcels of land situated in the city of Fargo. The plaintiff owns the fee, and the real purpose of the action is to cancel certain taxes or apparent taxes charged against the land in the years 1892 to 1898, inclusive, and also to vacate certain tax sales of the land, made upon such taxes. Defendant answered the complaint. The answer alleges in substance that all of said taxes and tax sales were regular and in all respects valid. The action was tried to the court and submitted for its determination, whereupon the trial court made and filed findings of fact and conclusions of law whereby it was adjudged that some of the tax levies and some of the tax sales in question were illegal and void, and that others involved were in all respects valid levies and sales; and judgment was directed to be entered pursuant to such findings, and judgment was entered accordingly. The plaintiff has appealed to this court from all parts of said judgment which are adverse to the plaintiff. Defendant has not appealed.

A statement of the case embracing all of the evidence offered at the trial was settled and allowed, and the same has been incorporated with the judgment roll and transmitted to this court. The statement omits to include any demand of a retrial in this court either of the entire case or of any specified fact in the case. The procedure which was had in the action in the court below was necessarily

governed by section 5630, Rev. Codes, 1899. But the party appealing had under said section an election, and could determine for himself whether the entire case or some fact therein should be retried in this court, or, on the other hand, whether this court should be precluded from retrying any question of fact in the case. By not demanding a retrial of any fact in this court the appellant has under the express provisions of said section, as well as under the repeated decisions of this court, deprived this court of all power or right to examine the evidence or retry any question of fact in the case. Section 5630, *supra*; *Bank v. Davis*, 8 N. D. 83, 76 N. W. Rep. 998; *Hayes v. Taylor*, 9 N. D. 92, 81 N. W. Rep. 49; *Nichols v. Stangler*, 7 N. D. 102, 72 N. W. Rep. 1089; also, case decided at this term,—*State v. McGruer*, 9 N. D. *infra*, 84 N. W. Rep. 363. And where we are precluded from a retrial of any fact the mandate of the section above cited is that all questions of fact "shall be deemed on appeal to have been properly decided by the trial court."

Counsel for appellant has filed a brief in this court, in which he repeatedly calls attention to the evidence in the record, and attempts to point out wherein the trial court, as counsel claims, erred or was mistaken in finding the facts which that court found as ultimate facts, and included in its findings of fact. Counsel calls attention to the fact that it appears that the evidence submitted below is undisputed, and was in fact stipulated by counsel, except as to the testimony of one witness who testified for the plaintiff. Counsel now urges this court to look at the evidence, and claims that upon an examination of the evidence this court will not fail to deduce ultimate facts therefrom which will differ radically from those deduced by the trial court. But, on the other hand, counsel for the respondent has, in his brief, called the attention of the court to the same evidence, and argues in his brief that the trial court was fully justified by the evidence in making the findings of ultimate fact which were filed in the court below. Counsel asserts in his brief that there is no question of evidence in the case. It is, however, manifest that counsel for the appellant is seeking in this court to alter and reverse the findings of fact made below; and, to accomplish this object, counsel urges that the undisputed evidence—embracing a mass of stipulated evidential facts—will, upon a proper consideration thereof by this court, lead to a reversal of the findings and judgment. But in the case at bar it has been seen that this court is precluded from a trial of any of the facts embraced within the issues. Nor can this be different in a case where the evidential facts were stipulated, and, as stipulated, were presented to the trial court. It appears that despite the stipulation the trial court found the ultimate facts to be quite different from those which counsel for plaintiff would deduce from such evidential facts. It was the province and duty of the trial court to weigh and consider all the evidence, excluding that which was incompetent, and from the evidence deduce the ultimate facts upon all the issues involved. See *Gull River Lumber Co. v. School Dist. No. 39*, 1 N. D. 500, 48 N. W. Rep. 427. It must

follow from what has been said that this court is precluded not only from a retrial of any facts in issue, but from any consideration of the evidence offered in the court below and embraced in the statement. Upon this record, therefore, we are to consider the statutory judgment roll, and nothing more. Counsel for appellant is not in a position to attack the findings of fact, and our attention is not called by counsel to any conclusion of law, as embodied in the findings, which is claimed to be unwarranted by the facts as found and filed in the District Court. Every legal presumption is in favor of the regularity and validity of the judgment entered in the court below, and hence we shall be compelled to direct an affirmance of the judgment. All the judges concurring.

ON PETITION FOR REHEARING.

In this action counsel for the appellant has filed a petition in this court which embraces a variety of features. Counsel asks—First, that this court shall grant a reargument of the case in this court; and, secondly, if the reargument is denied, that this court will remand the record to the District Court, to enable counsel to apply to that court for leave to incorporate a new feature in the statement of the case; thirdly, if the last-mentioned request is denied, counsel asks that the appeal be dismissed without prejudice to another appeal; and, finally, counsel asks, if each and all of his said requests are denied, that counsel may be permitted to amend, under section 5625, Rev. Codes, to cure the radical defect now existing in the statement of the case. Counsel contends with his accustomed vigor and earnestness that he should be permitted to reargue the case for the reason that the point upon which this court has decided the case was not suggested on the argument either by counsel or by any member of the court, and this ground is true in point of fact. But it appears in the original opinion that this court affirmed the judgment of the court below solely upon the ground that this court, upon this record, was not only without lawful authority to consider and determine the facts anew, but was further, under section 5630, Rev. Codes, commanded in such a case to rule that the facts as found and decided by the court below were “properly decided.” It therefore appears that in the case at bar the court was, under the express terms of an unambiguous statute, forbidden to sit as a trial court to hear the evidence and determine the facts. This being the law of the state, this court is bound by it; nor can authority to try any case on the evidence *de novo* be conferred, either by amicable arrangements between counsel, or otherwise than as the law directs. Upon this point, see *Montgomery v. Harker* (decided at this term), 84 N. W. Rep. 369; also, *Thuet v. Strong*, 7 N. D. 545, 75 N. W. Rep. 922, and cases cited in the original opinion in this case. It is true, this court did not at the argument call attention of counsel to the omission in the statement of any demand for a retrial of the facts. This omission cannot operate, however, to confer lawful

authority to try a case anew when the state of the record would render a retrial unlawful. The court, had it known of the omission, would most certainly have put a stop to the argument, and this for the reasons already stated. The point is one which cannot be waived by either court or counsel. The petition admits that the statement does not in express terms contain a request either for a retrial of the entire case or of any specified fact in the case, but counsel strenuously urges that a request for a retrial is substantially made in the statement. If this claim was supported by the facts, the petition to reargue the case would, of course, be granted. But repeated examination of the statement as made by each member of this court only serves to strengthen our unanimous conviction that no such demand is in any manner made in the statement. Counsel calls attention to a paper found in the statement which is headed "Assignment of Errors," and insists that the contents of this paper should be construed as a request for a retrial upon the evidence of the points enumerated in the paper, which are four in number. Upon this point we remark, first, that an assignment of errors occurring at the trial, or a specification of particulars wherein the evidence fails to justify the findings of fact, is alike inappropriate and confusing in a case tried under section 5630, which is brought to this court for a retrial of the facts. In such cases this court, under an innovation in the practice made by that statute, does not sit as a court of review to correct errors in ruling or findings of fact made by the trial court. On the contrary, we sit in such cases as a trial court, to consider the evidence, and determine the facts anew; and in this class of cases counsel should therefore embody their points in their briefs, and to call the attention of this court to erroneous rulings made below by assigning a list of errors in the statement is worse than useless. See *State v. McGruer* (decided at this term), 84 N. W. Rep. 363. But the assignment of errors embraces no request to retry any question of fact. The first and second errors assigned are as follows: "(1) In the year 1893 the assessment was void because that said tracts were assessed as one tract, and not as two tracts. Each tract should have been assessed separately. (2) In the years 1893, 1894, and 1895 the assessment was void, because that in said years the records of the county commissioners failed to show that they held any session as a board of equalization." It is manifest that the first error alleged consists in the erroneous ruling of the trial court in holding as a legal conclusion on the undisputed facts that the assessment was legal and valid. The second is like the first. The error complained of is that the trial court held that the equalization was legal and valid upon the facts stated, none of which are disputed. These assignments are illustrative of the other two assignments of error. It is therefore patent by the assignments themselves that counsel has pointed out to this court certain conclusions of law made by the trial court which were based upon the evidence submitted to the trial court. These conclusions of law are characterized as erroneous. But the question now is whether

this court has been lawfully requested to try anew any question of fact in the case. To this question we are compelled to give a negative answer. Upon this branch of the petition we will only reiterate what was said in the opinion,—that counsel has assigned no error in this court predicated upon the findings actually made and filed by the District Court in this case, and hence we shall give the judgment of the District Court the benefit of the *prima facie* assumption that the same is in all respects valid. Nor can this appeal be dismissed upon a mere *ex parte* application therefor, made after the case has been submitted and decided, and after a petition for a reargument has been denied. The application obviously comes too late.

The remaining requests of the petition must also be denied. The case next cited below is squarely on all fours with the case at bar. See *Ricks v. Bergsvendsen*, 8 N. D. 578, 80 N. W. Rep. 768. In the opinion in that case this court said: "The case was tried under chapter 5 of the Laws of 1897, and is governed by its provisions, which are unambiguous and simple in their requirements. The mandate of the statute is explicit and inexorable. The statement itself must contain the specifications as above indicated, and this court so held in *Bank v. Davis*, 8 N. D. 83, 76 N. W. Rep. 998. Nor does the statute admit of a construction to the effect that the required specifications can be incorporated either in a notice of appeal or in a judge's certificate, as was attempted here. Such is not the language of the statute. A simple observance of the provisions of the statute of 1897 in making up the record sent to this court would have insured a retrial of the action in this court upon the merits; but, upon the record as it exists, no review of the case upon the evidence can be had without a violation of the existing law, permitting this court to sit as a trial court in certain cases only. The exceptions filed below were wholly superfluous, and could not be considered in this court, even if the whole case could be reviewed. See *Bank v. Davis*, *supra*." In the *Ricks* Case, as in this, counsel, in a petition for a rehearing, urged this court to grant an opportunity for amending the statement under the provisions of section 5625, Rev. Codes. In denying such request this court used language which is directly applicable to the facts here. We said: "Counsel cites section 5625 of the Revised Codes, and claims that under said section it is the duty of this court to transmit the record, with a view to the perfection of the appeal, and to make the same effectual. But counsel in this case is not seeking to perfect the appeal or to make it effectual. The validity of the appeal is not at all involved in any object which counsel is seeking to attain. The citation is therefore not in point. The petition for a rehearing and the said request of counsel are denied. The other judges concurring." The petition is in all respects denied. All the judges concurring.

(84 N. W. Rep. 477.)

C. TRONSON vs. COLBY UNIVERSITY.

Opinion filed November 9, 1900.

Mortgage—Cancellation—Consideration.

A. executed and delivered to B. his non-negotiable promissory note, and secured the same by mortgage upon realty. B., in consideration thereof, agreed to have certain claims against A., which were held by third parties, and which were liens upon such realty, satisfied of record, no time for performance being fixed. B. sold the note and assigned the mortgage to C., but failed to have the prior liens satisfied in whole or in part. A. brings an action against C to have the note and mortgage canceled. *Held*, that the action could not be maintained.

Mutual Promises But Independent.

The promise to pay made by A., and the promise to procure satisfaction made by B., furnished each the consideration for the other; but they were independent promises, the breach of either furnishing an undisputed cause of action to the other party, and they could not become dependent by lapse of time.

Appeal from District Court, Traill County; *Pollock, J.*

Action by C. Tronson against the president and trustees of Colby University. Judgment for plaintiff. Defendant appeals.

Reversed.

Tracy R. Bangs, for appellant.

The note in suit is drawn with a stipulation for the payment of current rate of exchange in New York City in gold, or its equivalent, its negotiability is thereby destroyed. *Flagg v. School District*, 4 N. D. 30. In every other respect it is a perfect and valid promissory note. *Hastings v. Thompson*, 54 Minn. 182, 55 N. W. Rep. 968, 21 L. R. A. 178; *Whittle v. Bank*, 26 S. W. Rep. 1106. The note was given to McLaughlin in consideration of the \$170 in money and the latter's agreement to use the balance of the loan in paying off and securing the discharge of certain indebtedness due from Tronson to third parties. In this transaction there was a good, valuable and sufficient consideration for the \$1,000 note. Consideration in bills and notes is some right, interest, profit or benefit accruing to the one party, or some forbearance, loss, or in other words, detriment suffered by the other. *Bigelow on Bills & Notes*, 213; *Currie v. Nind*, Law Rep. 10 Exch. 162. It is always sufficient to hold the note if the maker thereof got what he contracted for whether that consideration be commensurate to the amount of money stated in the note, as measured by the ordinary theories of value, being entirely immaterial. *Wolford v. Powers*, 85 Ind. 294, 44 Am. Rep. 16; *Earl v. Peck*, 64 N. Y. 596; *Amherst Academy v. Cowles*, 23 Mass. 427, 17 Am. Dec. 387. The true consideration for the note and mortgage now in controversy was the money in hand paid by McLaughlin to Tronson, and McLaughlin's contract to become respondent's agent and pay off certain of respondent's debts. This

was sufficient consideration to support the note and mortgage. *Chapman v. Eddy*, 13 Vt. 205; *Earle v. Angell*, 32 N. E. Rep. 164; *Trask v. Vinson*, 20 Pick. 105; *Hubon v. Park*, 116 Mass. 541; *Turner v. Rogers*, 121 Mass. 12; *Hodgkins v. Moulton*, 100 Mass. 309; *Gutlon v. Marcus*, 43 N. E. Rep. 125; *Wells v. Sutton*, 85 Ind. 70; *Thompson v. Thompson*, 43 Ky. 502; *Lindell v. Rokes*, 60 Mo. 249, 21 Am. Rep. 395; *Hamier v. Sidway*, 21 Am. St. Rep. 693; *Wright v. Wright*, 54 N. Y. 437; *Gould v. Banks*, 24 Am. Dec. 60; *Overton v. Curd*, 8 Mo. 420; *Babcock v. Wilson*, 25 Am. Dec. 263; *Davis v. Calloway*, 95 Am. Dec. 671; *Howe v. O'Mally*, 3 Am. Dec. 693; *Sharon v. Sharon*, 8 Pac. Rep. 614; *VanEpps v. Redfield*, 68 Conn. 39, 34 L. R. A. 360; *Provenshee v. Piper*, 36 Atl. Rep. 552; *Pullman v. Booth*, 28 S. W. Rep. 719; *Gum Co. v. Braendly*, 51 N. Y. Supp. 93; *Daniels on Neg. Inst.* § 187; *Randolph, Com. Paper*, §§ 479-481. Respondent is not entitled to the relief prayed for, viz: the cancellation of the note and mortgage, because he has shown no mistake; he got all he contracted for. He has shown no fraud or accident. The note is non-negotiable, was past due when respondent commenced this action. No ground for the exercise of equity jurisdiction for the cancellation of a written instrument is alleged or proven. *Lewis v. Tobias*, 10 Cal. 575; *Field v. Holbrook*, 14 How. Prac. 108; *Hamilton v. Cummings*, 1 Johns. Chan. 517; *Pom. Eq. Jur.* § 1377. There must be a controlling reason for coming into equity. *Boyd v. Boyd*, 33 N. E. Rep. 568. Relief is never given as against an innocent purchaser. *Pom. Eq. Jur.* §§ 776, 871 and 918. Tronson made his note and mortgage to McLaughlin for a good and complete consideration. He thus put it in McLaughlin's power to transfer the securities. The instruments were valid in their inception and valid when taken by the Colby University. They are still valid and cannot be delivered up and cancelled without working an injustice to the present holder. 18 Enc. Pl. & Prac. 750, note 2; *Brown v. Boyd*, 158 Mass. 470, 33 N. E. Rep. 568; *Dixon v. Wilmington Trust Co.*, 20 S. E. Rep. 464; *Mayes v. Robinson*, 5 S. W. Rep. 611. There was no time specified for the performance of the promise of McLaughlin to secure releases of the prior incumbrances. Plaintiff must therefore allege and prove a demand and refusal to perform, or that McLaughlin is insolvent and unable to perform. *Worley v. Mourning*, 4 Ky. 254; *Hamble v. Tower*, 14 Ia. 530; *Morey v. Enke*, 5 Minn. 392; *Adkins v. Farrell*, 42 S. W. Rep. 1145; *Mount Joy v. Mullikin*, 16 Ind. 226; *Gray v. Greene*, 9 Hun. 334; *Parker v. Parker*, 9 South. Rep. 426; *Tom v. Wollhoefer*, 61 Tex. 277; *Charpoux v. Bellocq*, 31 La. Ann. 164; *Duggar v. Dempsey*, 43 Pac. Rep. 357; *Axtel v. Chase*, 77 Ind. 74; *Maness v. Henry*, 11 South. Rep. 410.

J. A. Sorley, for respondent.

Tronson executed to McLaughlin his note secured by mortgage, in consideration whereof McLaughlin agreed to take up and satisfy

of record a mortgage amounting to \$616, and judgments amounting to \$201, which he failed to do. Was the agreement dependent or independent? It will be construed as dependent unless a contrary intention appears from the terms of the contract itself. *Davis v. Jefferies*, 58 N. W. Rep. 815; *Lester v. Jewett*, 11 N. Y. 453; *Kane v. Hood*, 13 Pick. 281; *Swan v. Drury*, 22 Pick. 485; *Williams v. Healey*, 3 Denio, 363; *Grant v. Johnson*, 5 N. Y. 247; *Parker v. Parmele*, 20 Johnson, 130; *Galvin v. Prentice*, 45 N. Y. 162; *Dunham v. Pettee*, 8 N. Y. 508; *Smith v. Lewis*, 26 Conn. 110; *Clark v. Weis*, 87 Ill. 438; *Wagon Co. v. Crocker*, 4 Fed. Rep. 578; *Perry v. Connell*, 31 S. W. Rep. 685. If the note in question had been made payable at a time so soon after its execution that McLaughlin could not with reasonable diligence have secured satisfaction of mortgage and judgments, then a recovery could be had in an action commenced when the note fell due without showing a compliance with his part of the agreement, but if he delayed bringing the suit until a time when satisfactions should have been secured then a compliance with his agreement must be shown before a recovery can be had. *First Nat. Bank of Madison v. Spear*, 80 N. W. Rep. 166; *Bank v. Hagner*, 1 Peters, 455; *Loud v. Water Co.*, 153 U. S. 564; *Hogan v. Kyle*, 35 Pac. Rep. 399; *Divine v. Divine*, 58 Barb. 264; *Underwood v. Tew*, 34 Pac. Rep. 1100; *Shelly v. Mikkelsen*, 63 N. W. Rep. 210, 5 N. D. 22. The validity of the defense of want of consideration was passed on in *Flagg v. School District*, 5 N. D. 191; *Towle v. Greenberg*, 6 N. D. 37, 68 N. W. Rep. 82. A partial failure of consideration is a good defense *pro tanto*. 4 Am. & Eng. Enc. L. (2d Ed.) 195. The facts set out in the complaint are sufficient to invoke the aid of a court of equity. 3 Pom. Eq. Jur. 1188, 1233; 1 Pom. Eq. Jur. 166, 170 and 171; *Heywood v. City of Buffalo*, 14 N. Y. 534; *Ward v. Dewey*, 16 N. Y. 519; *Byne v. Vivian*, 5 Ves. 604; *Crooke v. Andrews*, 40 N. Y. 547; *Marsh v. City*, 59 N. Y. 280; *Lewis v. Tobias*, 10 Cal. 575; *Field v. Holbrook*, 14 How. Prac. 108; *Pierce v. Webb*, 3 Barb. Ch. 16; *Jackman v. Mitchell*, 13 Ves. 581; *Hayward v. Dimsdale*, 17 Ves. 111; *Petit v. Shepherd*, 5 Paige, 498; 2 Story's Eq. Jur. 700; *Ryerson v. Willis*, 81 N. Y. 277; *Fitzmaurice v. Mosier*, 16 N. E. Rep. 175; *Otis v. Gregory*, 13 N. E. Rep. 39. A party to an instrument which is of no legal force or validity whatever may ask the aid of a court of equity in procuring its surrender and cancellation. *Bishop v. Moorman*, 98 Ind. 1; *Scobey v. Walker*, 15 N. E. Rep. 674; *Brown v. Kranse*, 23 N. E. Rep. 1012; *Honnan v. Hartmentz*, 27 N. E. Rep. 731. A court of equity will freely rescind a conveyance by parents to a son in consideration of his covenant to support them, in case of a breach of such covenant. *Morgan v. Loomis*, 48 N. W. Rep. 109; *Blum v. Bush*, 49 N. W. Rep. 142; *Lamperv v. Lamperv*, 12 N. W. Rep. 514; *Mansfield v. Mansfield*, 52 N. W. Rep. 290; *Barker v. Smith*, 52 N. W. Rep. 723.

Such a court of equity will lend its aid to cancel a mortgage that is claimed to have been paid. *Donaldson v. Wilson*, 44 N. W. Rep. 429; *Ingals v. Bond*, 33 N. W. Rep. 404; *Shilling v. Darmody*, 52 S. W. Rep. 291; *Rogers v. Day*, 74 N. W. Rep. 190. By going to trial without raising the point, either by demurrer or answer, appellant cannot now for the first time be held to question respondent's right to the relief prayed. *Black v. Miller*, 50 N. E. Rep. 1009; *Stout v. Cook*, 41 Ill. 447; *Ryan v. Duncan*, 88 Ill. 144. An objection to the jurisdiction of the court that there is a perfect remedy at law cannot be made for the first time at the hearing, it should be taken by demurrer to the bill or by answer. 1 Enc. Pl. & Prac. 883; *Clay v. Greenwood*, 53 N. W. Rep. 659; *Corey v. Sherman*, 60 N. W. Rep. 232; *Buck v. Young*, 27 N. E. Rep. 1006; *Mayes v. Goldsmith*, 58 Ind. 94; *Day v. Henry*, 4 N. E. Rep. 44; *Lauder v. Green*, 46 N. W. Rep. 1108; *Benjamin v. Vieth*, 45 N. W. Rep. 731; *Gould v. Hurto*, 15 N. W. Rep. 588; *First Nat. Bank v. Rowley*, 61 N. W. Rep. 195; *Bright v. Ecker*, 68 N. W. Rep. 326; *McVey v. Marratt*, 45 N. W. Rep. 548; *Dodge v. Davis*, 52 N. W. Rep. 2; § 5272, Rev. Codes; *Kolka v. Jones*, 71 N. W. Rep. 558.

BARTHOLOMEW, C. J. This is an action in equity to cancel a certain note for \$1,000 held by defendant against plaintiff, and to cancel and satisfy of record a mortgage upon real estate given to secure said note. Plaintiff was successful below. There is but one question in the case, and that is a question of law. The undisputed facts show that in January, 1889, the plaintiff borrowed from one S. W. McLaughlin the sum of \$600, and gave McLaughlin his promissory note for said sum, due December 1, 1893, and bearing interest at the rate of 8 per cent. per annum before maturity, and 12 per cent. after maturity. To secure this note plaintiff executed and delivered to McLaughlin a mortgage upon certain land in Traill county, which was recorded January 24, 1889. Prior to March 30, 1893, judgments in favor of four different parties had been docketed against plaintiff in Traill county. These judgments amounted to about \$1,200. A few days after the note and mortgage above mentioned were given, McLaughlin sold the note and assigned the mortgage to one Brooks, and the assignment was recorded February 1, 1889. On March 30, 1893, and prior to the maturity of the note for \$600, plaintiff made another loan from said McLaughlin for the sum of \$1,000, for which amount he executed his note to said McLaughlin, secured by mortgage upon the same land. At the time this note was executed it was non-negotiable, by reason of the fact that it contained a provision for current exchange on New York. *Flagg v. School District*, 4 N. D. 30, 58 N. W. Rep. 499, 25 L. R. A. 363. A few days after their execution the note was sold and mortgage assigned by McLaughlin to defendant, who now holds and owns the same. It is clear, under the evidence, that at the time of the execution and delivery of this note and mortgage the plaintiff received no money from McLaughlin. He made this loan for the

purpose of taking up the existing liens upon his land, to-wit: the mortgage for \$600 and the judgments already mentioned; and McLaughlin promised to get the mortgage and the judgments satisfied upon the records in Traill county, and send proofs of such satisfactions to plaintiff, and to send plaintiff any balance from the \$1,000 loan that should be coming to him. Subsequently he sent plaintiff a check for \$176.60, but he never paid the outstanding mortgage of \$600 or the judgments, or any portion of either. Plaintiff, having paid interest upon the last loan in excess of the amount of cash received thereon, now seeks to cancel the note and mortgage by reason of the facts stated. It is evident that whether he can succeed or not depends upon whether or not his promise to pay was dependent upon the fulfillment of McLaughlin's promise to procure release of the prior mortgage and judgments. If the promise was thus dependent, then the consideration for the note has to that extent failed, and plaintiff's equity is inherent in the note, and in McLaughlin's hands the note would represent no indebtedness, and, the note not being negotiable, defendant would stand in no better position. But, on the other hand, if plaintiff delivered his promise to pay, relying upon McLaughlin's promise to secure the releases,—in other words, if McLaughlin's promise was the consideration for the promise to pay,—then there was a full consideration for the promise to pay, and no equity in plaintiff's favor inheres in the note. He may have his cause of action for damages against McLaughlin for breach of contract, but he cannot avoid his liability upon the note. The industry of counsel for the respondent has enabled him to cite many cases where the question of dependence or independence of promises was discussed. But the cases cited do not aid us to any extent. He cites *Lester v. Jewett*, 11 N. Y. 453,—a leading case, and one that cites many authorities. In that case the defendant agreed in writing to purchase certain shares of stock at a future day certain, and at a stated price. The vendor sought, after the date for performance, to recover the purchase price. The court held that to entitle him to recover he must aver and prove a tender of the stock, as the promises were dependent. This principle is always enforced in contracts of sale unless there are special circumstances. The law presumes the promises to be dependent unless the contrary clearly appears. The vendor cannot recover the purchase price unless he tenders the goods and demands payment. The vendee cannot recover damages unless he tenders payment and demands the goods. Respondent cites and quotes from the late case of *Davis v. Jeffris* (S. D.) 58 N. W. Rep. 815. There two parties entered into a contract by which, for a price to be paid by one, the other agreed to construct a building equipped with certain patent machinery, to be used in carrying on the business for which the building was designed; the builder agreeing to procure a deed from the patentee conveying the right to use the machinery in such building. The builder sued to recover the contract price, without furn-

ishing the grant from the patentee. The court held that he could not recover; that the grant was a thing of value, without which the machinery might prove of no value to the other party; and that the promise to procure the grant and the promise to pay were dependent. We note these facts only to show the manifest distinctions between those cases and the case at bar. Respondent also relies upon *Perry v. Connell* (Tex. Civ. App.) 31 S. W. Rep. 685, and that case is more nearly in point. There the defendant gave his note to plaintiff in consideration of the delivery to him of a note that he had previously given to a third person, and which plaintiff represented was in his possession and belonged to him. The note was never delivered up. The court denied a recovery by plaintiff. As the case is reported, we cannot see that the principle involved is different from what it would have been had the note been given in consideration of a loan of money then to be made, and the payee had taken the note, but declined to pay over the money. In other words, it was a promise to do a certain act in presenti,—something that should be consummated then and there; and in the contemplation of the parties it was the completed act, and not the promise, that furnished the consideration for the note.

In the case at bar it was well known and understood that the promise made by McLaughlin could not then be consummated, nor was any definite time fixed for its consummation. The note and mortgage were executed and delivered in Grand Forks county. The releases were to be made upon the records of Traill county. The note secured by the old mortgage would not be due until eight months after the execution of the second mortgage. McLaughlin did not own it or pretend to own it. An assignment by him of the old mortgage had been on record for four years. There is nothing to indicate that the holder of the note would accept payment before maturity. The judgments must be satisfied. McLaughlin could not satisfy anything. His promise was, primarily, to procure others to act. It was only the acts of third parties that could benefit plaintiff. For these reasons it is apparent that the parties did not understand that the promise to pay and the promises to procure the releases of the liens were dependent promises. This may appear in a stronger light if we change parties defendant and the cause of action. Let us suppose that, after waiting a reasonable time for McLaughlin to procure the releases, plaintiff had paid the prior liens, and then brought action against McLaughlin to recover damages for the breach of his agreement to procure such releases; would it be contended that McLaughlin could defeat the action by alleging that plaintiff had not paid his note of \$1,000, and that the performance of the promise to procure the releases was dependent upon the performance of plaintiff's promise to pay? And yet, if those promises were dependent, they were mutually dependent. We conclude, then, that the promise to procure the releases, and not the fulfillment of that promise, constituted the consideration of the note.

See, upon this point, *Chapman v. Eddy*, 13 Vt. 205; *Trask v. Vinson*, 20 Pick. 105; *Earle v. Angell*, 157 Mass. 294, 32 N. E. Rep. 164; *Hubon v. Park*, 116 Mass. 541; *Hodgkins v. Moulton*, 100 Mass. 309; *Turner v. Rogers*, 121 Mass. 12. But, conceding that the promises were independent when made, respondent insists that they had become dependent when this action was commenced. He cites the familiar instances where a party contracts for the sale of real estate, and takes notes for the purchase price, maturing at different times, and contracting to execute to the payee a deed of the land upon full payment. Of course each note except the last may be sued upon as it matures, without reference to the execution of the deed. No action can be maintained upon the note last maturing without a tender of the deed. As to that note the promises were dependent from the first. If the grantor permits all the notes to run until the maturity of the last, and then brings suit upon all, he can recover nothing without tendering a deed. This is familiar law. See *Shelly v. Mikkelsen*, 5 N. D. 22, 63 N. W. Rep. 210, and cases cited. By electing to permit all payments to run until the last becomes due, the grantor treats all as becoming due at that time; but performance upon his part is then due, and by his own act he has made the entire payment dependent upon his performance. Respondent insists that, as the time for performance upon McLaughlin's part has elapsed, no recovery could be had upon the note without pleading performance upon McLaughlin's part. We think this is fallacious, and that the principle invoked cannot be applied to this case. No portion of plaintiff's promise to pay was ever made, by contract, dependent upon performance by McLaughlin. No time was ever fixed for performance by McLaughlin. No demand for performance was ever made upon him, so far as the record shows. He may yet perform, for aught that appears. If he fail, plaintiff has his independent right of action against him for damages. Suppose, to repeat an illustration, that plaintiff were asserting that right of action against McLaughlin now; could McLaughlin defend by alleging plaintiff's failure to pay the note for \$1,000? Clearly not. Performance by McLaughlin could not be made to depend upon such payment. And if payment were overdue it could make no difference. These propositions need no support. Plaintiff cannot recover upon this record. Had plaintiff been forced to pay those prior liens, or had he voluntarily paid them, a different case might be presented. Upon that we express no opinion. The record clearly shows that nothing has been paid upon those claims. In the judgment of this court, the action should be dismissed. The District Court is directed to set aside its judgment entered herein, and enter judgment dismissing the action. Reversed. All concur.

(84 N. W. Rep. 474.)

STATE EX REL P. J. MCCLORY *vs.* N. MCGRUE.

Opinion filed November 7, 1900.

Liquor Nuisance—Injunction.

This is an action brought under section 7605, Rev. Codes 1895, to abate a liquor nuisance, and enjoin its further maintenance. The complaint broadly charged, in effect, that the defendant, who was a licensed pharmacist, holding a druggist's permit, had established and was maintaining in his drug store a liquor nuisance by selling and keeping for sale intoxicating liquors as a beverage. When the evidence was closed, the trial court, upon the request of plaintiff's counsel, made and filed findings of fact whereby it conclusively appears that the defendant had in fact established in his drug store, and was there maintaining, a liquor nuisance, as defined in said section, and was there selling and keeping for sale intoxicating liquor as a beverage, and had frequently sold such liquors as a beverage to minors, habitual drunkards, and others. Upon such findings the District Court filed its conclusions of law adjudging that the court had not jurisdiction of the subject-matter of the action, and that the action could not be maintained, under said section, as against a druggist holding a regularly issued permit; and pursuant to such findings a judgment was entered in the District Court dismissing the action with costs. *Held*, that said conclusions of law are not warranted by the facts found, and are entirely erroneous; and *held*, further, that the judgment entered herein is erroneous, and must be reversed, and a new judgment entered for the relief demanded in the complaint.

Exceptions to Findings Not Reviewable on Appeal from Judgment.

Both parties have appealed to this court from said judgment, and the defendant states in his notice of appeal that he is desirous of attacking said findings of fact in this court. A statement of the case was settled, which embodies certain exceptions to the findings of fact; also certain specifications whereby the defendant alleges that such findings are unsupported by the evidence, and are, moreover, illegal, because the same are based upon incompetent testimony, to which defendant objected at the trial. The statement further embraces a list of alleged errors of law based upon rulings made upon the admission of the evidence, but said statement does not contain any of the evidence offered at the trial. *Held*, construing section 5630, Rev. Codes 1899, that each and all of said enumerated papers contained in said statement of the case are wholly unauthorized by any law or rule of practice, and that none of the same have any efficacy whatever in any case in which the procedure is governed by said section of the Code.

Stated Case Must Demand Retrial.

Held, further, that where, as in this case, there is no demand embodied in the statement of the case, either for a retrial in this court of the entire case or of any specified fact therein, this court is wholly without power to retry any issue of fact in the case. *Held*, further, that in such cases this court will not sit to review alleged errors of law arising on rulings made upon the elicitation of the evidence in the court below. See *Bank v. Davis*, 8 N. D. 83, 76 N. W. Rep. 998; *Hayes v. Taylor*, 9 N. D. 92, 81 N. W. Rep. 49; and *Nichols Shepard Co. v. Stangler*, 7 N. D. 102, 72 N. W. Rep. 1089.

Appeal from District Court, Cavalier County; *Fisk*, J.

Action by the state, on the relation of P. J. McClory, assistant attorney general, against N. McGruer, to abate a liquor nuisance. From the judgment both parties appeal.

Reversed. Judgment ordered for plaintiff.

Bosard & Bosard, for appellant.

Templeton & Rex, and *F. W. McLean*, for respondent.

WALLIN, J. This action was instituted by P. J. McClory, as assistant attorney general, under section 7605 of the Revised Codes of 1895, to abate an alleged nuisance created by selling and keeping for sale intoxicating liquors as a beverage. The action was tried to the court without a jury, and after the evidence was submitted counsel for plaintiff framed and presented to the trial court findings of fact,—18 in number,—and requested said court to make and file such findings, and further requested the court to make and file certain conclusions of law in plaintiff's favor, and to direct the entry of a judgment for the relief demanded in the complaint. Pursuant to such request, the trial court made and filed each and all of plaintiff's said findings of fact, but refused to find the conclusions of law as requested by plaintiff's counsel; whereupon the trial court made other conclusions of law favorable to the defendant, and thereby adjudged that under the facts so found the trial court did not have jurisdiction over the subject-matter of the action, and the court further directed that the action be dismissed, with costs against the plaintiff. Pursuant to such findings, judgment was entered dismissing the action, with costs. From such judgment the plaintiff appealed to this court, and subsequent to the plaintiff's appeal the defendant also perfected an appeal to this court from said judgment. The notice of appeal served by defendant embraced the following language: "By this appeal the defendant seeks to review only the findings made by the court in behalf of plaintiff at plaintiff's request." A statement of the case was settled in the District Court, and the same is incorporated in the record sent to this court. The statement of the case embraces certain papers, the material features of which may be summarized as follows: (1) A paper showing that defendant, at the opening of the trial, objected to the introduction of any evidence under the complaint, for the reason that the complaint did not state a cause of action, in this: (a) That an injunctive proceeding will not lie against a druggist holding a permit under the laws of this state; (b) upon the ground that the court has not jurisdiction of the subject-matter; (c) upon the ground that the complaint does not charge violations of the law with sufficient certainty. (2) At the trial the defendant further objected to the introduction of any evidence of sales of liquors to any person whomsoever except to one Ed Gleason, for the reason that sales to no other persons were charged in the complaint. (3) The introduction of evidence of sales to minors and habitual drunkards was objected to upon the ground that sales to such persons were not

alleged. (4) Objections were made to the introduction of evidence upon various other grounds, but these need not be particularly set out, as the same are wholly immaterial for reasons which will be hereafter stated. (5) The statement of the case further embodied exceptions to 12 of the said findings of fact made at the plaintiff's request. All of said exceptions are made upon the ground that there is no competent evidence tending to support the same; all of said evidence having been objected to by the defendant. (6) The statement embraces, also, specifications of particulars in which the defendant seeks to point out wherein said 12 findings of fact are not justified by the evidence, and this on the ground that the evidence was incompetent, and was received against the defendant's objections thereto. (7) The statement further contains a list setting out 12 "specifications of errors of law." These specifications are aimed also at the court's findings of fact, including findings numbered from the fifth to the sixteenth, inclusive. These alleged errors of law are placed upon the ground that such facts, respectively, were erroneously found, for the reason that the evidence offered to sustain the same was incompetent, and was received against objection made by the defendant.

The complaint is as follows: "(1) That at the city of Langdon, in the county of Cavalier, and state of North Dakota, the defendant herein, in a building situated on lot six (6) of block twenty-seven (27) of the original townsite of Langdon, now keeps and maintains a bar and place for the sale of intoxicating liquor as a beverage; that at said place the said defendant has maintained, ever since the 1st day of January, 1896, a public bar, equipped with glasses, bottles, and has during all of said time and he does now keep therein beer, wine, whisky, brandy, and divers and sundry other fermented, malt, and vinous liquors,—all of which said liquors are intoxicating; and the defendant keeps the same in said building for the purpose and with the intent of selling the same to be used and drank as a beverage, and for the purpose of selling the same in violation of law. (2) That the defendant has sold intoxicating liquors at said place to divers and sundry persons, and particularly as follows: Alcohol to Ed Gleason on July 7, 1898; and is now engaged in selling such liquors continuously and as a common practice and business, and will continue so to do, as plaintiff is informed and verily believes, unless restrained by the proper order of this court. (3) That said defendant, N. McGruer, has permitted said intoxicating liquors to be used and drank upon the said premises, and over his said bar, and now allows the same to be used and drank over said bar; and he, the said defendant, knowingly permits persons to resort to said place for the purpose of drinking intoxicating liquors as a beverage. (4) That the defendant, N. McGruer, is now, and at all the times hereinafter and hereinbefore mentioned has been, the owner in fee of the building situated on lot six (6) of block twenty-seven (27) of the original townsite of the city of Langdon, in Cavalier

county, state of North Dakota, wherein the saloon operated by the said N. McGruer is kept as aforesaid. (5) That a permit has been issued to said defendant, N. McGruer, by the county judge of said Cavalier county of Cavalier, N. D., but that said liquor was sold in violation of said permit. (6) That the said N. McGruer will continue to occupy said place, and to keep and use the same as a place for the sale of intoxicating liquors, as aforesaid, and a common saloon, indefinitely in the future unless restrained by the injunction and decree of this court." The relief demanded in the prayer of the complaint was that such nuisance should be abated, and the defendant enjoined from further maintaining the same, for general relief, and for costs. The answer to the complaint consisted of denials of all the material features of the complaint.

This action having been tried in March, 1899, by the court without a jury, is, as to its procedure in the court below and in this court, governed by the provisions of section 5630 of the Revised Codes of 1899; and with reference to the matter of procedure an important preliminary question is presented. The record does not embrace the evidence presented to the court below, or any part thereof; nor does the statement of the case embrace a demand by either of the appellants of a trial anew in this court either of the entire case or of any specified question of fact in the case. In view of these omissions, the language of said section 5630 is directly applicable to this case. The section declares, with reference to a statement of the case, that the appellant "shall specify therein the questions of fact that he desires the Supreme Court to review, and all questions of fact not so specified shall be deemed on appeal to have been properly decided by the trial court." It is further declared that the Supreme Court "shall try anew the questions of fact specified in the statement, or in the entire case." Under the language of said section it is clear that upon this record this court is without power either to try anew the entire case, or any particular question of fact in the case. The statute is further explicit to the point that, in the absence of specifications, and of any demand of a retrial in this court, this court is compelled to hold that all questions of fact decided below were properly decided. Upon this point see *Bank v. Davis*, 8 N. D. 83, 76 N. W. Rep. 998. In the case cited this court used the following language: "Under the amendment we are considering such specifications as are required by former statutes and by the rules of this court are no longer required in actions tried below without a jury, and which come to this court for a retrial upon the merits." See 8 N. D. 86, 76 N. W. Rep. 1000. In the case at bar no question of fact presented in the record can be retried, and it is, therefore, clear in this case that the list of alleged errors of law contained in the statement and based upon the rulings made upon the admission of the evidence are not pertinent, nor does the same subserve any useful purpose; and this is true likewise of the list of specifications above mentioned, in which it is sought

to point out wherein the several findings of fact are not justified by the evidence. It must follow that the said alleged errors of law arising upon the admission of the evidence and said alleged errors in the findings of fact must be wholly disregarded in disposing of this case. See, also, *Hayes v. Taylor* (N. D.) 81 N. W. Rep. 49, and *Nicholas-Shepard Co. v. Stangler*, 7 N. D. 102, 72 N. W. Rep. 1089.

The record being thus purged of extraneous matter, there remains but a single question for determination in this court. This question arises on the face of the statutory judgment roll, and is strictly a question of law. Briefly stated, the question is whether the complaint states a cause of action. The trial court held in terms that it did not, and that the action should be dismissed for want of jurisdiction in the court over the subject-matter, and upon the ground that a civil action cannot be maintained under the statute against a druggist holding a permit. A perusal of the findings of fact furnishes conclusive evidence that during all of the time referred to in the complaint, and subsequently, and while the action was pending, and until it was tried in the District Court, the defendant was extensively engaged in selling intoxicating liquors as a beverage, and during all of said time defendant was keeping a place in which intoxicating liquors were sold and kept for sale in violation of law. Said unlawful business was at all times conducted and carried on upon premises owned by defendant, and described in the complaint. It is also true, and the court so finds, that said liquor was sold within defendant's drug store, and while the defendant had a druggist's permit, which authorized him to sell intoxicating liquor for the purposes and under the restrictions specified in the statute. Upon this state of facts it is entirely clear that the defendant has been guilty of establishing and maintaining a liquor nuisance, within the meaning of section 7605 of the Revised Codes of 1895. Upon the facts found by the trial court the legal inquiries are whether such nuisance, when the same is established and maintained in a drug store, and by a licensed pharmacist holding a druggist's permit regularly issued under the statute, can lawfully be abated, and its further maintenance enjoined, by a court of equity in a civil action, instituted under the statute. We have reached the conclusion that all of these questions must receive an affirmative answer. It is the contention of counsel for the respondent that the District Court did not have, and could not obtain, jurisdiction of the subject-matter of the action, for the reason, as counsel claims, that the action to abate a liquor nuisance cannot be maintained in any case as against a defendant who is a druggist, and who holds a regularly issued permit. In support of this contention counsel argue that the statute (chapter 63, Rev. Codes 1895) has prescribed certain remedies and certain procedure which are special in character, and which are intended to be exclusive in all cases in which a druggist is or may be prosecuted for violating the provisions of the statute. Counsel concede that the

section of the statute which defines the class of nuisances under consideration (section 7605) is broad enough in its terms to embrace all persons, including druggists, who are guilty of maintaining the nuisance defined in the section; but, to avoid the effect of this concession, counsel has invoked a rule of statutory construction, which rule counsel have formulated in their brief as follows: "We maintain that the correct rule is that special provisions in a statute made directly applicable to a certain class of persons are exclusive, and limit general provisions of the statute which might include such class in the absence of special provisions." The special provisions of the statute upon which counsel rely to shield a druggist holding a permit from prosecutions brought to abate a nuisance are found in sections 7594, 7596, and 7597 of the Revised Codes. These sections contain in detail provisions controlling the issuing and cancellation of a druggist's permit, including the matter of a druggist's bond, and suits brought thereon; and also provide the procedure in the County and District Courts in and about the matter of obtaining and canceling such permits. Section 7597 relates chiefly to criminal offenses created by said section, and which offenses in their nature are such as can be committed only by a druggist holding a permit, and in addition to such offenses—peculiar to druggists—this statute provides, in effect, that such druggists may be punished criminally, as other persons are punishable, for violating the provisions of the chapter. The several sections of the Code above cited have been carefully considered with reference to the contention of counsel, and this court must confess that it is wholly unable to understand their pertinency to such contention. Each and all of said sections are, in so far as they are peculiar to and limited to druggists holding permits, wholly foreign to the matter of abating a liquor nuisance or enjoining the same. This action is brought in a court of equity to abate a nuisance, and to enjoin its further maintenance, and it has no other or different purpose. The statute, in the sections above last cited or elsewhere, has not furnished any procedure or remedies peculiar to druggists whereby a liquor nuisance, when maintained in a drug store, may be enjoined; and hence we are unable to see that a druggist who may in fact have established a nuisance in a drug store can have immunity from prosecution in equity under a statute which is broad enough in its terms to include all who may violate the statute by maintaining a nuisance. Our conclusion upon this point of the case is that the rule of statutory construction invoked by counsel in defendant's behalf has no application to the facts in the record or to the statutes which control this case.

But counsel further contends, or seems to contend, that, inasmuch as the druggist, by his permit, is authorized, under the statute, to have and keep intoxicating liquors in his possession for sale in his drug store for certain lawful purposes defined in the statute, it follows that in a case where a druggist abuses the privilege conferred by the permit, and proceeds to keep intoxicating liquors

in his drug store for sale as a beverage, he is not guilty of maintaining a nuisance, or, rather, that such nuisance cannot be enjoined by a court of equity. Counsel has cited no authority to sustain this ground of their contention, and it is, in our opinion, needless to add that no case will support any such theory. It must be self-evident that no permit to exercise a lawful privilege can ever be invoked as an excuse or shield for the commission of unlawful acts under cover of such permit.

Counsel invites the especial attention of the court to the following language, found in section 7605, *supra*: "The finding of such intoxicating liquor or liquors on such premises shall be *prima facie* evidence of the existence of the nuisance complained of." This language has reference to intoxicating liquors found by an officer empowered to search for the same under a warrant, which, in this class of cases, may be issued in connection with a temporary injunctive order. In the case at bar no such warrant appears to have been issued; hence no liquors so seized were or could be used in this case as evidence that the defendant is guilty of maintaining the nuisance complained of. But counsel contends that the action cannot be sustained, because section 7605 of the statute permits the warrant to issue in any case brought under said section, and, when the liquor is found on the premises, that the same is, under the statute, *prima facie* evidence of the existence of the nuisance. Counsel inveighs against this statute as "abhorrent to the legal mind." Counsel points to the fact that the liquor which the druggist is permitted to have in his possession, when found on his premises by an officer, is, under the statute, *prima facie* evidence against the druggist. From the apparent harshness of the statute, counsel would have the court infer that the statute was not intended to apply to the case of a druggist. But it may be said that this entire statute is one peculiarly drastic in its provisions. Whether the statute is wise or unwise, mild or severe, is not, however, a question upon which the courts are required or expected to pass. But the particular provision now under consideration—that which makes the finding of liquor upon the premises evidence of the existence of the nuisance—is, in our opinion, less severe than some of the other features of the law. The liquor so found cannot be used as evidence against a druggist in a criminal prosecution or in a criminal contempt proceeding against such druggist. See section 7614. On the contrary, liquor kept by a citizen for strictly private and lawful uses may be used against him in any criminal action or contempt proceeding when the same is found in his dwelling house, if the owner of such liquor happened to reside in a store or tavern. This feature not only illustrates the severe character of the statute, but it further shows that the druggist under the statute is dealt with more leniently than the citizen who does not hold a permit. The druggist, of course, has, under this statute, no greater right to keep liquor in his store than the private citizen has to keep it in his dwelling house for lawful purposes. Nevertheless, the law discriminates in

criminal prosecutions in favor of the druggist and against the citizen who is not a druggist. Section 7614. The statute from which we have quoted above has reference only to evidence in a civil action in which the court has power only to abate a nuisance and enjoin the same. In such an action the court, in its final judgment, can impose no criminal penalties whatever. Nor can such liquor be seized by a warrant, or used as evidence, until it is first made to appear by affidavit that liquor is upon certain specified premises, and that the same is there being used unlawfully.

But section 7605 further provides that an officer under a search warrant, who finds such liquor on premises described in the warrant, is required to take the same into his custody, and further required to take the personal property there found into his custody; and finally the officer is commanded to take possession of such premises, and to hold possession thereof, and of said liquor and personal property, until "final judgment" is rendered in the action. With reference to these provisions counsel contend that a mischievous person, acting from malicious motives, might falsely accuse a reputable druggist of maintaining a nuisance in his drug store, and thereby might institute proceedings under the statute which would result in closing up the store, and destroying the business there being conducted. We concede that such a result is possible, but we apprehend that the possibility of an abuse cannot operate to defeat any constitutional measure of governmental control enacted by the sovereign will. It is, of course, possible that any citizen may be maliciously and falsely accused of crime, and be arrested and imprisoned in consequence of such false accusation. Such things have happened. But no one would think of repealing the Code of Criminal Procedure in view of such a possibility; much less should a court, by mere interpretation, annul plain provisions of the statute, merely because the statute is severe in its requirements, or may possibly be used for purposes of oppression in exceptional cases. But counsel further say that this statute cannot apply to any nuisance in a drug store kept by a licensed druggist because it might happen—although it did not in this case—that a druggist whose liquors and premises are seized under a search warrant would necessarily be compelled to await the trial and final judgment before he could have an opportunity to apply to the court for a restoration of his property. If this is the true interpretation to be placed upon the statute, it might certainly, in exceptional cases of abuse, operate harshly, and perhaps oppressively; but, if it did so operate, we are clear that this would be a matter for legislative consideration and correction. It is our opinion, however, that no such vexatious delay in applying for the restoration of the property is necessary in any case. In cases arising under this statute, where property is seized and held by an officer under a search warrant, the officer so holding the property acts entirely under the instructions of the court sitting in an equity case. Actions brought under section 7605

of the Revised Codes are in all their phases and aspects actions brought for equitable relief. The statute, it is true, provides certain machinery which is peculiar to this law, and which the legislature has devised to further the purposes of the law; and the statute also has, under the police power, by its very terms defined a nuisance which before its passage was not a nuisance at common law, in legal contemplation. But this statute has not attempted to limit any power which, under established procedure, obtains in courts of chancery. Nor does it follow that, because the statute is silent, a suitor in such a case may not resort to any procedure adapted to the exigency of his case, provided the same is a procedure which is established, and has the sanction of courts of equity. All equity procedure, therefore, adapted to the needs of a suitor in such a case as this, would be available to a druggist or to any suitor whose property had been seized under an interlocutory order issued in an action brought to abate a common-law nuisance. It must follow that the statute which declares that such officer, having the custody of property seized under a search warrant, holds such property as the mere instrument of the court, and that the provisions which require him to hold possession until "final judgment" must be limited, so as to confine their operation to cases in which the court does not revoke or modify the warrant under which the seizure is made. If the court, by an order *pendente lite*, directs its officer to restore such property to its owner, the mandate of the statute would not, in our opinion, be further obligatory upon the officer, because in such a matter the officer acts wholly upon interlocutory orders and instructions, and these are subject to judicial modifications from time to time. It is true that under section 7605 courts of equity in this state have been coerced by the terms of the statute in such a way as to make it mandatory upon the court to issue a temporary injunction and a search warrant in all cases arising under the section wherein the prescribed showing is made in the complaint and by way of affidavit, and under said section the requirement that the officer shall take and hold possession if he finds intoxicating liquors is also mandatory. But the statute goes no further. It does not deprive the court of power to direct the restoration of property upon a showing that it has been seized and is held under a mistake of fact. Such action may be taken by a court pursuant to an order to show cause, and can be speedily brought to a hearing, either in term time or vacation. Nor can this court assume that any chancellor would permit the business of a druggist, when lawfully conducted, to be broken up or long embarrassed, if it appeared upon such hearing that his store and goods had, by an order of court, been seized and were held under a mistake of fact. In brief, our conclusion is that the District Court has jurisdiction to abate and enjoin the nuisance which the court in its findings declared had been established and was being maintained by the defendant in his drug store. The findings of fact are emphatic and full, and are broadly to the effect that the defendant is guilty of maintaining a nuisance in his drug

store. Under the facts contained in the record, we shall be compelled to direct the trial court to reverse its judgment herein, and to enter a judgment in favor of the plaintiff for the relief demanded in the complaint; and such will be the order of this court. All the judges concurring.

BARTHOLOMEW, C. J. I concur in the result, but, as to the last point, not upon the ground stated in the majority opinion. I do not believe it was ever intended by the legislature that a court should inquire into the truth of the averments contained in the affidavit upon which the warrant for search and seizure of property and premises is based until the final hearing. It is clear that the fact thus involved must be the controlling fact in the main case every time; and if this fact can be determined upon motion to discharge the property or premises seized, then, in effect, the case can always be tried upon affidavits. True, these actions to abate nuisances are in courts of equity, but the procedure is detailed with particularity. The statute is careful to point out how premises may be released. I think that method exclusive. The officer is not directed to seize and hold property until the further order of the court, but "to abide the final judgment in the action." When the provisions prescribed by the statute have been fully met, the result announced by the statute must follow. I am aware that this construction makes the statute exceedingly drastic, but I cannot find that any constitutional guaranty is violated.

(84 N. W. Rep. 363.)

THOMAS BOLTON *vs.* C. C. DONAVAN, *et al.*

Opinion filed November 9, 1900.

Parties Defendant—Appealable Order.

This action is instituted for the recovery of money only, and was originally commenced against C. C. Donovan as sole defendant. Upon an application made to the trial court by said defendant, which was opposed by the plaintiff, the trial court, by its order, directed that the defendant the John Miller Company be brought into the action as an additional defendant. *Held*, that said order was error, construing sections 5230, 5238, Rev. Codes 1899. In such actions the plaintiff cannot be compelled to litigate his claim as against a party he has not chosen to sue.

Bringing in Additional Party Defendants.

Held, further, that said order bringing in the additional party defendant is one which "involves the merits," within the meaning of section 5626, Rev. Codes 1899, and hence is appealable under said section.

Appeal from District Court, Walsh County; *Sauter*, J.

Action by Thomas Bolton against C. C. Donovan and the John Miller Company. From an order bringing in defendants, plaintiff appeals.

Reversed.

Spencer & Sinkler, for appellant.

H. A. Libby, for respondents.

WALLIN, J. The facts embraced in this record which we regard as decisive of this appeal are briefly as follows: The action is brought to recover an alleged balance of \$732.95, which the plaintiff alleges is due to him from the defendant C. C. Donovan on account of certain grain which the plaintiff avers was his property, and which the defendant Donovan, as plaintiff alleges, sold, and failed to account for except in part. The defendant Donovan answered the complaint and set out various matters as a defense to plaintiff's cause of action; and said defendant, in his prayer for relief, demanded that said action be dismissed as to him, and that a certain corporation, viz: the John Miller Company, of Duluth, Minn., be made a party defendant herein. A motion was made in the District Court in behalf of the defendant Donovan for an order bringing said John Miller Company into the action as a party defendant. Said motion was heard upon the pleadings and certain affidavits and counter affidavits, and thereupon said court, by its order, granted the motion, and directed that all subsequent proceedings herein be had in the name of Thomas Bolton, plaintiff, against C. C. Donovan and the John Miller Company, a corporation of Duluth, Minn. The plaintiff objected to the order upon certain grounds, and excepted to the action of the court in granting the same. The objections and the exception were duly brought up on the record, whereupon the plaintiff appealed from such order to this court.

In this court we are to inquire, first, whether the order is an appealable order. The order is strictly interlocutory, and it is well settled that such orders cannot be reviewed by appeal prior to the entry of judgment, in the absence of a statute granting an appeal therefrom. Upon authority the question of the appealability of this class of orders is much embarrassed by the great number of cases arising under statutes which, while they are similar to each other in many features, are often dissimilar in some particulars. Each case must, therefore, be governed by the statute under which an appeal has been taken or attempted. In this case the question presented is governed by section 5626, Rev. Codes 1899. This section embraces five paragraphs or subdivisions numbered from 1 to 5, inclusive. Subdivisions numbered 2, 3 and 5 may be dismissed from consideration, because they are obviously inapplicable to the order in question. To be appealable, therefore, the order must be classified with those enumerated or referred to in either the first or fourth subdivision of the section. It is the claim of counsel for the appellant that an appeal will lie under both of said subdivisions, but we cannot yield assent to this broad claim. We can readily understand how an order bringing into an action an additional party may greatly embarrass the plaintiff in prosecuting his action, as such an order may operate to introduce new issues and complications which are wholly foreign to the plaintiff's cause of action against the original defendant. This would be the prob-

able result in actions at law for the recovery of money only. For this reason we concede that the order in question affected a substantial right of the plaintiff; *i. e.* a right to prove his case against the defendant, whom the plaintiff has sued, and as to whom alone the complaint alleges a cause of action. But under subdivision 1 of section 5626 it is not enough that an order affects a substantial right. To be appealable under subdivision 1, two other elements are made essential. The order must, first, be of such a character as to "determine the action," and, second, must so operate as to "prevent a judgment from which an appeal might be taken." To our minds, it is too clear for discussion that the order in question does not fall within subdivision 1. It does not purport to determine the action, either upon the merits, or upon technical grounds, or at all; nor does the order, in our judgment, have any such practical effect upon the action. It is equally obvious that the order does not, in its terms or in its effect, so operate as to prevent the entry of a final judgment from which an appeal might be taken.

The remaining and more difficult question is whether the appeal can be upheld under subdivision 4. This subdivision grants an appeal from an order "when it involves the merits of an action, or some part thereof." We have reached the conclusion that the order is appealable under subdivision 4. The cases which we cite below from Wisconsin, Minnesota, and South Dakota in support of this view all arose under statutes identical in terms with that above quoted from subdivision 4. The crucial question in all of said cases is whether the order "involved the merits," and a solution of this question necessitated a construction of the meaning of the phrase "involves the merits." The term "merits" as used by the profession, when applied to actions, usually denotes the subject or ground of an action as stated in the complaint, or the grounds of defense as stated in the answer; and a trial of the merits of an action generally means the elicitation of evidence in support of the averments of fact set out in the pleadings. But the courts, in construing statutes governing appeals from interlocutory orders, have frequently enlarged this meaning, and have held that the phrase "involves the merits" must be so interpreted as to embrace orders which pass upon the substantial legal rights of the suitor, whether such rights do or do not relate directly to the cause of action or subject-matter in controversy. See *Insurance Co. v. Morrison*, 56 Wis. 133, 14 N. W. Rep. 12; *Clark v. Langworthy*, 12 Wis. 442; *Tubbs v. Doll*, 15 Wis. 640; *Schaetzl v. City of Huron* (S. D.) 60 N. W. Rep. 741; *Railroad Co. v. Gardner*, 19 Minn. 132 (Gil. 99); *Bingham v. Board*, 6 Minn. 136 (Gil. 82). See Rev. St. Wis. 1878, p. 799, § 3069, subd. 4; also 2 Gen. St. Minn. 1894, p. 1659, § 6140, subd. 3; also Comp. Laws Dak. § 5236, subd. 4. As to what is comprised or embraced in the phrase in question, see the reasoning of the court in *St. John v. West*,

4 How. Prac. 329. See, also, the following cases from New York: *Chapman v. Forbes*, 123 N. Y. 532, 26 N. E. 3; *In re Butler*, 101 N. Y. 307, 4 N. E. 518; *Kain v. Delano*, 11 Abb. Prac. (N. S.) 29; *Platt v. Platt*, Id. 110. In *Insurance Co. v. Morrison* the trial court, in an order to foreclose a mortgage, made an order bringing in a stranger who claimed an adverse and paramount interest in the premises, as a party defendant. This order was reviewed in the Supreme Court on appeal therefrom, and the appealability of the order was expressly placed upon the ground that it "involved the merits," and this in a case where it was ruled that rights which are senior to and adverse to the mortgage cannot be litigated in an action to foreclose except by consent. In *Clark v. Langworthy* the trial court held that an order refusing to make a complaint more definite was appealable, and in *Mattson v. Curtiss* it was ruled that an order allowing a defendant to file a supplemental answer is appealable, and in *Tubbs v. Doll* the court held that an order denying a motion to bring in an additional party defendant in a foreclosure action is appealable. In the case from South Dakota (60 N. W. Rep. 741), the trial court made an order before trial which, in its effect denied the intervenor's application to withdraw from the action on payment of costs. The order was held to be appealable as an order involving the merits, despite the fact that the effect of the same was simply to compel the intervenor to continue in the action as a party, and litigate his rights. The order did not refer to the subject of the action, or to the facts or merits as averred in the intervenor's complaint. The case of *Chapman v. Forbes* is much in point. In that case an appeal was taken from an order granting a motion made in the trial court by the defendant to bring a party into the action as an additional defendant. The court of appeals held that the order was reviewable on appeal therefrom, and this because it compelled the plaintiff in an action at law to litigate his case against a party whom he had not sued. This order did not purport to relate to the merits in the ordinary sense in which that term is used by lawyers. It simply directed that an additional party should be brought into the action. Under a statute which gave the right to appeal from an order "affecting a substantial right," it was held in New York that an order of reference made in a case where no reference could lawfully be made was appealable. See *Kain v. Delano*, supra; also, *Platt v. Platt*, supra, where an order directing the inspection of partnership account books was adjudged to be an appealable order. Under the authority of these adjudications we shall be constrained to hold that the order in question involves the merits, and is an appealable order; but there is another consideration which leads to the same conclusion. In our opinion, the order is one which involves the merits in the sense illustrated in the cases cited, and yet is not one which "necessarily affects the judgment." If we are correct in this interpretation of the statute, the order could not be reviewed in this court upon appeal from final judgment. See section 5627,

Rev. Codes, 1899. It would follow, of course, that, unless this important order can be reviewed by an appeal taken from the order itself, under section 5626, *supra*, there can be no review of the order at all. To so rule would, in our judgment, violate both the letter and spirit of the statutes governing the appellate jurisdiction of this court. It is, perhaps, needless to add that all of the authorities concur in holding that the statute regulating appeals from interlocutory orders do not sanction an appeal from rulings made at the trial upon mere questions of practice; such as those made upon the admissibility of the evidence, and like practice questions. These are reviewable in another mode. This brings us to a consideration of the order upon its merits. Counsel for the defendant C. C. Donovan contends that the order can be sustained under either section 5230 or 5238, Rev. Codes 1899. The contention of respondents' counsel seems to be that the John Miller Company either has or claims to have an interest in the subject of the action, and that such interest is not only adverse to the plaintiff, but is likewise exclusive as to Donovan. But, if this assumption is sustained by the facts appearing of record, it goes no further than to show that the plaintiff has sued the wrong defendant. Under section 5230 any person who has or claims an interest in the controversy which is adverse to the plaintiff may be made a defendant; but this section nowhere lends sanction to the idea that a plaintiff in an action at law, who has sued the wrong defendant, may either upon his own application or upon that of the defendant, obtain an order of court bringing in a stranger as an additional defendant. Said section does not relate to bringing in additional defendants by an order of court. Section 5238 voices a rule which has always obtained in courts of chancery. Under this rule a court of equity will refuse to determine a controversy as between parties who are in court, unless it can be done without prejudice to the rights of others who have not been made parties. As has been seen, this case is strictly an action at law for the recovery of money only. The plaintiff's complaint nowhere suggests that the John Miller Company is liable to plaintiff on account of the wheat which the plaintiff alleges that Donovan sold under plaintiff's direction, and has not accounted for the proceeds to the plaintiff. The defendant seeks to avoid liability on the ground that whatever liability may exist in favor of plaintiff on account of the sale of the grain is a liability of said company alone. It is obvious, therefore, that no interest of the John Miller Company is involved, or can be prejudiced by any determination of the issues made in the pleadings as between plaintiff and Donovan. Donovan can obtain a judgment of dismissal by showing that he is not liable on account of the wheat or the sale thereof, and to do so any testimony tending to show that the John Miller Company alone is liable to plaintiff would be competent. In *Chapman v. Forbes* 123 N. Y. 532, 26 N. E. Rep. 3, the court holds that in an action at law for the recovery of and only a money judgment the plaintiff cannot be compelled to bring in other parties whom he has not seen fit to sue.

See *Cohen v. Lane* (Sup.) 4 N. Y. Supp. 228; *Webster v. Bond*, 9 Hun. 437. Also, *Osterhoudt v. Board*, 98 N. Y. 239. Our conclusion is that the order appealed from was made without legal authority, and hence must be reversed, and that said order is an appealable order. All the judges concurring.
(84 N. W. Rep. 357.)

CATHERINE A. RILEY vs. JOHN RILEY.

Opinion filed November 10, 1900.

Cancellation of Deed—Burden of Proof—Alteration.

In a case where a plaintiff seeks to annul a deed of conveyance, and alleges as ground of relief that the deed has been materially altered after its execution, the burden to show such alteration rests upon the plaintiff; and in such cases the plaintiff must make out his case by evidence which is clear, strong, and convincing.

Evidence Insufficient.

Applying the rule above stated to the evidence in this case, *held*, that the plaintiff has failed to establish her cause of action.

Appeal from District Court, Pembina County; *Sauter, J.*

Action by Catherine A. Riley against John Riley and others. From a judgment dismissing the action, plaintiff appeals.

Affirmed.

W. J. Kneeshaw and *Tempton & Rex*, for appellant.

Burke & Vick, for respondents.

WALLIN, J. This action is brought to annul and cancel a deed of record purporting to convey three separate pieces of land. The case was tried without a jury, and the trial court entered judgment dismissing the action. Plaintiff appeals from the judgment, and demands a retrial of the entire case in this court.

The facts embraced in the record which are uncontroverted may be stated briefly as follows: The plaintiff is the widow of one William Riley, who departed this life on the 8th day of October, 1896. Plaintiff intermarried with the deceased in the month of January, 1893. The defendants, except the administrator and the guardian, are the heirs at law of the deceased and his children by a former wife. The deed in question purports to convey three pieces or parcels of real estate, situated in the county of Pembina. The land first described in the deed is an undivided one-half of a certain quarter section of land. This description is written out at length in words, with numbers in brackets added. The second and third parcels are not described at length in words, but are described as follows: "Also the E. $\frac{1}{2}$ of N. W. $\frac{1}{4}$ and W. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$, Sec. 10, town 162, range 52, containing 160 acres; also, S. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$, S 10-162-52. (Known as the 'George O'Hara 40-Acre Lot.')" The

deed describes the plaintiff as party of the first part, and said William Riley, deceased, as party of the second part, and purports to have been made in consideration of one dollar in hand paid to the party of the first part. It bears date on March 2, 1895, and was acknowledged by the plaintiff on that day before one Paul Johnson, a justice of the peace. This deed was delivered to the deceased, and was found in his barn some months after his death, and was subsequently recorded. The deed, in all its parts, is in the handwriting of William Riley, deceased, and the plaintiff concedes that the same was signed and delivered by her voluntarily. The plaintiff's contention, as stated in the brief of her counsel, is, substantially, that at the time the deed was executed and delivered by the plaintiff the only tract of land described in the same was the undivided half of a certain tract, containing 160 acres of land, and that such description was written out at length in words as well as in numbers, and that subsequently said deed was altered without plaintiff's knowledge or consent, by inserting in the deed a description of two other parcels of land owned by the plaintiff, and which are hereinbefore referred to and described. Defendants answer the complaint, and deny that the deed has been altered or added to as alleged in the complaint, and the issue of fact thus joined is the decisive question in the case. Upon this issue the trial court found adversely to the plaintiff, and the judgment entered below recites that the action was dismissed "upon the failure of the plaintiff to establish the facts set up in her complaint by clear and satisfactory evidence." Some of the evidence offered by the plaintiff in support of her contention is direct and positive in its character. The plaintiff testified in her own behalf, and her testimony was to some extent corroborated by other witnesses who testified for the plaintiff. The original deed was put in evidence, and the same by consent of counsel was presented to this court for its inspection, and counsel for appellant claims that the deed bears evidence on its face of having been altered after its execution and delivery; but this court, unaided as it is by the testimony of experts in handwriting, is unable to say, after an examination of the instrument, that the same appears on its face to have been altered after its delivery.

Excluding the deed from consideration, the testimony bearing upon the matter of the alleged alteration of the instrument is wholly oral. The plaintiff swears positively that she read the deed before signing it, and that but one tract of land was described in it at the time she signed the same, and, further, that she never authorized any one to insert the descriptions in the deed which describe the other two parcels in question. One Robert Baskin was sworn in plaintiff's behalf, and testified in substance that long after the date of the execution of the deed in question, and about one week prior to the decease of William Riley, he (the witness) was present at and heard a conversation between the plaintiff and William Riley, her husband, in which the latter urged the plaintiff to deed back the homestead to him; that the plaintiff positively refused to do so. The homestead referred to is one of the pieces of land described in the deed, and which

plaintiff claims was not described in the deed when she signed it. With respect to this testimony counsel argue with much persistency and force that the same tends strongly to show that when the conversation occurred the plaintiff had not in fact previously conveyed the homestead to her husband by the deed in question or at all. We concede that this testimony tends to corroborate the positive evidence of the plaintiff. Another witness for plaintiff (one Eastman) testified to a conversation which he (the witness) had with the deceased only a few days prior to his death, and concerning the land in question. This witness testified in substance that the deceased then stated his belief that he had not long to live, and, further, that he was anxious to adjust his business affairs equitably before his death, and to that end was desirous of obtaining from his wife a deed of conveyance of the said homestead. In the same connection the witness testified: That the deceased stated that he feared that the deed which he already had in his possession, and which the deceased stated was then in the barn of the deceased, would not stand law. That the deceased further said that he wanted his wife to change the deed, and that he would give her some place, and that he wanted to divide his property himself; that the deed which he then had was written out by himself; and that he "didn't know whether it was right or not." And he said that she had promised him that if he would go and write the deed, and fix her right, that she would sign it back to him." Eastman further testified that the deceased further stated that he had not written out the deed "all at one time; that he had filled in some ink, and corrected some errors that was in it. And he said that it was not in the same condition. He said that he was afraid that it would not stand law." This testimony was received against objection thereto, and the same was clearly inadmissible, upon the ground that it details a conversation had with the deceased when not in the presence or hearing of the plaintiff, unless the testimony reveals an admission by the deceased against his interest. But, granting that the evidence is admissible, we are of the opinion that the testimony does not necessarily show that the deed had been altered and forged, as charged in the complaint; nor is there anything in it which shows that any corrections or alterations which the deceased made in the instrument were made subsequent to its delivery. The deceased did not state that he knew the deed was worthless, and for that reason would not stand law. He went no further than to express doubts of the validity of the deed. He said that he "didn't know whether it was right or not." His reference to the condition of the deed is, we think, too indefinite to indicate what he meant by the reference.

Turning to the evidence offered by the defense, we do not deem it necessary to set out the same at any length. It will suffice to state in general terms that at least two witnesses,—one a brother and the other a daughter of the deceased,—both of whom were present when the deed was acknowledged, testify positively that

the deed when offered in evidence was in the same condition it was in when it was executed and delivered, and that no additional descriptions of land had been inserted in the deed after its execution. This direct and positive evidence came from witnesses who show themselves to be in a position to know just what was in the deed when it was delivered, and, further, to know what the plaintiff at and prior to the execution of the deed agreed to convey by the deed in question. The testimony of these witnesses was to some extent corroborated by the justice of the peace who took the acknowledgment of the deed. The case, therefore, is one wherein the evidence is in square conflict. Nor are we prepared to say on which side the evidence preponderates. Nor is it necessary in such a case as this that the court should reach a definite conclusion as to the preponderance of the evidence. In view of the conflicting character of the oral evidence, the deed itself, being a written instrument, must turn the scale against the plaintiff. To overcome the deed the evidence must be clear, strong, and convincing that the same is not the deed of the parties. We fully agree with the trial court, which heard and saw the witnesses, that the plaintiff has not offered evidence sufficiently strong and convincing to overcome the written instrument. The case comes under the rule laid down in *Jasper v. Hazen*, 4 N. D. 1, 58 N. W. Rep. 454. The judgment of the District Court must be affirmed. All the judges concurring.

YOUNG, J., having been of counsel, did not sit in the case; C. J. Fisk, judge of the First Judicial District, sitting by request.
(84 N. W. Rep. 347.)

EMMONS COUNTY vs. LANDS OF FIRST NATIONAL BANK OF BISMARCK, *et al.*

Opinion filed October 27, 1900.

Delinquent Tax List—Affidavit of Clerk.

Construing chapter 67, Laws 1897: Pursuant to section 1 of said act the county treasurer of Emmons county filed a delinquent tax list with the clerk of the District Court, and attached his affidavit thereto, a copy of which is set out in the opinion. *Held*, upon grounds appearing in the opinion, that said affidavit substantially conformed to the requirements of the statute and is sufficient.

Immediately—Construed.

Said affidavit and list were filed with the clerk on August 19, 1897. *Held*, construing the words "immediately" and "forthwith," found in section 1 of said statute, that said words are directory merely, and that the said list was filed in due time and while the act was in force.

Publication of Delinquent Tax List.

The county commissioners of Emmons county, at a special session of the board held June 5, 1897, adopted a resolution whereby they designated a newspaper in which said delinquent tax list should be published. The call for said special session was issued and published

by the county auditor of said county and was, after excluding its formal parts, as follows: "Notice is hereby given that the board of county commissioners is called to convene on June 5, 1897, for the purpose of fixing the amount of bond, and approving the same, required to be given by the publisher of the delinquent tax list, under the provisions of chapter 2, Laws of 1897, and also for the transaction of any other business that may come before the board." *Held*, for reasons given at length in the opinion, that said call, when construed in the light of the provisions of said chapter 67, was sufficient to advise the commissioners and the public of the fact that the commissioners would at said special session do whatsoever the law required them to do in the matter of the publication of said delinquent tax list, including the letting of the contract to publish the list, fixing the amount of and approving the publisher's bond, and designate a newspaper in which the board would require the publication to be made. All of such acts are closely linked together, and the performance of all is naturally and usually, if not necessarily, done at the same time, and such acts are so associated that notice of the doing of one will reasonably suggest the doing of all.

Call for Special Session Must State Object.

The auditor's call of the special session was made pursuant to section 1898, Rev. Codes 1895. Construing said section, *held*, that the object of the special session must be stated in the call with reasonable certainty, and the business done at such session must be confined to the objects stated in the call. *Held*, further, that the following words, "for the transaction of any other business which may come before the board," embraced in said call, or any similar language, cannot operate to enlarge the scope of the call, or authorize the commissioners to enter upon business not named in the published call of the auditor.

Designation of Newspaper.

The statute contemplates that the number of special sessions of the county board shall be relatively small, and that the public shall be advised by a published call as to what particular public interest it is which demands the assembling of the commissioners in special session. *Held*, under the facts stated in the opinion, and construing section 1 of the act, that a certified copy of the resolution designating a newspaper for the publication of the tax list was filed in due season with the clerk of the District Court.

Excessive Judgments—Jurisdiction.

On motion papers presented to the District Court, it appeared by affidavit that certain tax judgments against defendants' lands were entered for taxes on said delinquent list, which had never been lawfully levied, and, further, that said judgments were entered for amounts of interest and penalty largely in excess of any amount lawfully chargeable against the land. *Held*, that neither of these facts in any wise affected the jurisdiction of the court to enter such judgment, nor did either of said facts operate to render the judgments wholly void.

Tax Judgments Sustained.

The order of the District Court vacating said judgments, and setting aside the tax sales made thereunder, was erroneously made, and the same is reversed, and the District Court is directed to enter an order revoking the same, and an order denying defendants' application to set aside said tax judgment.

Appeal from District Court, Emmons County; *Winchester, J.*
Action by the County of Emmons against the lands of the First

National Bank of Bismarck and others, to enforce payment of taxes on real estate delinquent in and prior to the year 1895 in such county. Judgment for defendants, and plaintiff appeals.

Reversed.

George M. Register and Cochrane & Corliss, for appellant.

This appeal is from an order vacating, as null and void, a final judgment in tax proceedings under the tax law of 1897, and allowing the defendant, the owner of the land against which the judgment was rendered, to serve an answer in the case. The statute, in terms, declares that the proceedings under it constitute an action, and such is the holding of all the courts construing this and similar statutes. *McHenry v. Kidder County*, 8 N. D. 413, 79 N. W. Rep. 875; *Pine County v. Lambert*, 58 N. W. Rep. 990; *State v. Lands*, 42 N. W. Rep. 476; *In re Stultsman County*, 88 Fed. Rep. 337; *Wells County v. McHenry*, 7 N. D. 246, 74 N. W. Rep. 241. The filing of the list is the filing of the complaint and also constitutes a notice of the pendency of such action. When the list is filed the clerk prepares a notice which, with the list, is published for three weeks, and this notice constitutes the process, and the publication thereof the service of such process, and, upon default, judgment is entered as in other cases, but against the land and not against any person. Chap. 67, Laws 1897. The defendant has moved to vacate a final judgment in a civil action. The burden is upon him to set forth the specific grounds on which such judgment shall be vacated. As against his attack, the law presumes the judgment to be valid and regular and the court must consider only the defects, irregularities and grounds for vacating the same, which are embraced in the motion and supported by competent proof. 15 Enc. Pl. & Pr. 286; *Farrington v. New England Investment Co.*, 1 N. D. 108-109, 45 N. W. Rep. 191; *Busching v. Sunman*, 49 N. E. Rep. 1091. The claim that the judgment is void because entered by the clerk, is untenable. The entry of judgment is purely a ministerial act. The clerk is not called upon to pass upon any controverted issues of fact or question of law, because the default of those interested in the land confesses the legality of the tax appearing upon the published list; besides the clerk has before him a prima facie case. The statute declares that the list filed with the clerk shall be prima facie evidence that all the provisions of law in relation to the assessment and levy of the tax have been complied with. § 9, chapter 67, Laws 1897; § 1585, Statutes of Minnesota, 1894; *Bond v. Pacheco*, 30 Cal. 530. The jurisdiction of the court does not depend upon there being a valid tax, but upon the fact that a complaint has been filed against the land claiming a certain tax to be legal, and the land itself brought within the jurisdiction of the court by the publication of the notice and list, which, under the statute, constitutes lawful service against the property. The courts construing similar statutes have uniformly held, that the jurisdiction of the court was not affected by the fact that the land

was exempt from taxation, or that the tax had been paid. *Chisago County v. Railway Company*, 6 N. W. Rep. 854; *Chauncey v. Wass*, 30 N. W. Rep. 820. This holding necessarily assumes that the jurisdiction of the court does not depend upon the existence of a tax, for in each of these cases there was no tax; in the one case because there was no power to tax the land at all, and in the other case because the tax had been paid. The general plan and scheme of this tax law, as a whole, is that delinquency is the very issue tendered in these proceedings, and upon which the judgment is conclusive. Everything, whether payment of the tax, exemption of the property from taxation, illegality of the tax, or anything that would show the land was not delinquent in fact, is intended to be mere matter of defects. *Chisago County v. Railway Co.*, 6 N. W. Rep. 454; *Wallace v. Brown*, 22 Ark. 118; *Worthen v. Ratcliffe*, 42 Ark. 330; *Knoll v. Woelken*, 13 Mo. App. 275; *State v. Sargent*, 12 Mo. App. 228; *Mayo v. Foley*, 40 Cal. 281; *Cadmus v. Jackson*, 52 Pa. St. 295; *Gaylord v. Scarff*, 6 Ia. 179; *Gage v. Parker*, 103 Ill. 528. One of the so-called jurisdictional defects in the assessment is, that the assessor did not assess the land from actual view or upon any reliable information, but that the land was arbitrarily valued and assessed at a sum in excess of the value placed upon other lands. This in no manner affects the jurisdiction. The taxpayer must, for an unequal assessment, seek redress before the administrative body established by law for the purpose of hearing his grievances. *State v. Lakeside Land Co.*, 73 N. W. Rep. 970; *State v. West Duluth Land Co.*, 78 N. W. Rep. 115. The other grounds of defects in the assessment and levy are, that in certain years the land was not properly described, and that levies were made by percentage and not in specific amounts and were made without being based upon an itemized statement. These defects do not take away the jurisdiction of the court to adjudicate that the taxes were legal. *Wells County v. McHenry*, 7 N. D. 246; *In re Stutsman County*, 88 Fed. Rep. 337. There was no affidavit of merits presented upon the motion, and this is fatal to the order appealed from. *Sargent v. Kindred*, 3 N. D. 1; *Kirschner v. Kirschner*, 7 N. D. 291; *Freeman*, Judgments, 108; 6 Enc. Pl. & Pr. 187-188. No proposed verified answer was served with the moving papers. This is essential. 6 Enc. Pl. & Pr. 181-184; *St. Paul, Etc. Ry. Co. v. Blackman*, 44 Minn. 514. Defendant has been guilty of gross and inexcusable laches. The law proceeds on the theory that, this being a proceeding in rem, personal notice is not given, or required to be given to those who are interested in the res. *Dausman v. St. Paul*, 23 Minn. 394; 6 Enc. Pl. & Pr. 164-190. Section 9, chap. 67, Laws 1897, is taken from § 1588, Statutes of Minnesota 1894. The Supreme Court of Minnesota have held that a taxpayer cannot show, on the proceedings to obtain a tax judgment, that his land was not fairly assessed. *State v. Lakeside Land Co.*, 73 N. W. Rep. 970; *State v. West Duluth Land Co.*, 78 N. W. Rep. 115; *McCurdy v.*

Prugh, 55 N. E. Rep. 154. The court acquired jurisdiction over the land by the publication of the statutory notice. Such mode of acquiring jurisdiction in such cases has been repeatedly sustained. *Chauncey v. Wass*, 30 N. W. Rep. 628; *Francis v. Grote*, 14 Mo. App. 324; *Gage v. Parker*, 103 Ill. 528; *Wallace v. Brown*, 22 Ark. 118; *Dausman v. St. Paul*, 22 Minn. 394; *Chisago County v. St. Paul Ry. Co.*, 6 N. W. Rep. 454; *Commissioners v. Morrison*, 25 Minn. 295; *State v. Sargent*, 12 Mo. App. 228; *Watson v. Ulbrich*, 18 Neb. 186-189. This is a proceeding in rem and not a proceeding against a person. The court takes jurisdiction of and proceeds against specified property exclusively; the final judgment is rendered against such property and not against any person. The statute forbids the setting aside of the sale by indirection, as by setting aside the judgment, and in proceedings to vacate the judgment after the sale has been made, except on the ground of want of jurisdiction would be futile. § 15, chap. 67, Laws 1897; *Chauncey v. Wass*, 30 N. W. Rep. 828. The legislature may prescribe the time within which a party may obtain relief against a judgment. *Sargent v. Kindred*, 5 N. D. 472; 6 Enc. Pl. & Pr. 197; *Chauncey v. Wass*, 30 N. W. Rep. 831. It is the fact of the service of process or the publication of notice that gives jurisdiction, and not the proof thereof. It is elementary that the proof of service may be filed at any time or the fact of service established by any competent evidence. *Cowan v. Farrell*, 7 N. D. 397; *Lawrence v. Howell*, 2 N. W. Rep. 617; *Hugh v. Clark*, 66 N. W. Rep. 262; *Bernett v. Blatz*, 46 N. W. Rep. 319; *Frisk v. Reigelman*, 43 N. W. Rep. 1117; *Commissioners v. Morrison*, 22 Minn. 179; *Southern Pacific Fruit Exchange v. Starum*, 54 Pac. Rep. 345. Courts have frequently reversed orders vacating judgments, even in cases involving discretion, on the ground of the abuse thereof, and such orders will always be reversed when illegally granted. *Bailey v. Laffee*, 29 Cal. 422; *Dausman v. St. Paul*, 23 Minn. 394; *Gauthier v. Rusicka*, 3 N. D. 1; *Kirschner v. Kirschner*, 7 N. D. 291; *Sargent v. Kindred*, 5 N. D. 472. Even when the motion is made within the time fixed by statute it will be denied if the party has been guilty of laches. 6 Enc. Pl. & Pr. 192; *Gerrish v. Johnson*, 5 Minn. 10; *Groh v. Bassett*, 7 Minn. 254; *Altman v. Gabriel*, 28 Minn. 134. The order is appealable. It is an order made after final judgment affecting a substantial right. *Petition of St. Paul & Duluth Ry Co.*, 6 N. W. Rep. 454.

F. H. Register, Stevens & Allen, and H. A. Armstrong, for respondents.

WALLIN, J. In this action (improperly entitled a "proceeding") the District Court for Emmons county, by an order dated February 28, 1900, vacated, as void, and set aside, certain tax judgments entered by said court against certain lands and described in said tax judgments. The judgments so vacated were entered pursuant to chapter 67 of the act of 1897, authorizing actions to be com-

menced to recover taxes becoming delinquent in 1895 and prior years, together with the interest, penalties, and costs therein. Emmons county has appealed to this court from such order, and the record embraces the order itself, and all of the papers upon which the order is based, which include the proceedings in the actions in which said tax judgments were entered, and the notice of motion and the affidavit upon which the hearing was had in the District Court, which culminated in the order upon which this appeal is taken. The grounds of the motion to vacate said tax judgments, as stated in the notice of said motion, are quite voluminous, but the same are summarized in the brief of counsel for the respondents as follows (we quote literally from respondents' brief):

"Point 1. The county treasurer of Emmons county did not immediately after the passage and approval of chapter 67 of the Laws of 1897, as required by section 1 of the act, make and file in the office of the clerk of the District Court of his county a list of taxes upon real estate, as provided by section 1, and no such list was filed until six months after the passage and approval of the act. He did not annex to the list an affidavit as required by statute." The treasurer of the county filed a tax list with the clerk of the District Court on August 19, 1897. After excluding formal parts, the affidavit annexed to the list is as follows: "I, H. W. Allen, treasurer of Emmons county, do solemnly swear that the within and foregoing is a correct list of real estate taxes for the years therein stated, of said county, becoming delinquent in and prior to the year 1895, and that the same have not been paid into the county treasurer." Section 1 of the act (chapter 67, Laws 1897) requires the county treasurer to attach to the list filed with the clerk of the District Court his affidavit, embracing, among other averments, a statement "to the effect that the same is a correct list of the taxes upon real estate in his county." As has been shown, the affidavit used the phrase "of said county" instead of "in said county." This phrase is criticised by counsel, and counsel argues that the words "of said county" point to taxes levied for county purposes, and for none other, whereas the law required that all delinquent taxes on real estate in the county, whether state or local, should be placed on the list. The words used in the statute are "in the county" and the affidavit would therefore have been more technically accurate if these words had been inserted in it, but we think the language actually employed, when fairly construed with its context and in the light of the statute, is, of the same import as the statutory words, and hence we cannot sustain this contention. Nor would the entire omission of such affidavit at all affect the jurisdiction of the court. *Commissioners v. Morrison*, 22 Minn. 178.

Respondents' second proposition under point 1 of his brief, is to the effect that all proceedings in the action, including the tax judgments, are absolutely void, because, as counsel contends, the action was instituted too late. Counsel calls attention to the provi-

sions of section 1 of the act requiring county treasurers to file such tax list with the clerk "immediately after the passage and approval of the act," and requiring the clerk of the District Court to "forthwith make a copy thereof and attach thereto a certain notice," and the treasurer to publish such notice "forthwith." The statute in question became a law on February 20, 1897, and this action was instituted by filing the tax list with the clerk on August 19th, following the filing,—a period of one day less than six months after the law took effect. The statute itself does not undertake to name any period after which it will cease to be in force, nor has counsel ventured to indicate in his brief any date when it will finally cease to operate as a law of the state. The contention of counsel is that the language of the act which has been quoted all looks to celerity of action on the part of county officials, and his claim is that the record shows that the county officials of Emmons county were dilatory, and did not manifest sufficient promptness in instituting these actions. We certainly do not feel called upon by the facts of this case to decide, in the absence of any testimony explanatory of such delay as occurred, that, as a matter of law, the action to collect these taxes was commenced too late, and after the act in question had ceased to be a law of the state. It is true, the law took effect on February 20th; but it is a matter of common knowledge that the sessions laws of this state are seldom published officially prior to the month of August next following their enactment. Keeping this consideration in view, it would seem that the officials of Emmons county had acted with reasonable promptness, especially as it hereafter appears that official action was taken under the law as early as June 5, 1897. But the language of the statute we have quoted, and which is relied upon by counsel to sustain his contention, is purely directory in character, and must be so construed under established rules of construction. We find the governing rule laid down in 23 Am. & Eng. Enc. L. 458, as follows: "Statutory prescriptions in regard to the time, form, and mode of proceeding by public functionaries are generally directory, as they are not of the essence of the thing to be done, but are given simply to secure system, uniformity, and dispatch in the conduct of the public business." See Suth. St. Const. §§ 447, 448. In section 448 the author states the rule as follows: "Provisions relating to duties of public officers, and specifying the time for their performance, are in that regard generally directory." See *State v. Lean*, 9 Wis. 279; *Kipp v. Dawson*, 31 Minn. 373, 380, 17 N. W. Rep. 961, 18 N. W. Rep. 96. This rule of construction was applied by this court in *Johnson v. Day*, 2 N. D. 295, 50 N. W. 701. In the light of these authorities, we have no hesitation in holding that this action was instituted during the life of the statute.

The second point in the brief of respondents' counsel is as follows: "Point 2. The newspaper in which the tax list was published was never designated by a resolution of the board of county commissioners of Emmons county." With respect to this proposition

the record discloses that the commissioners of Emmons county assembled on June 5, 1897, and then and there adopted and spread upon their record the following resolution: "Resolved, that Emmons County Record is hereby designated as the newspaper in which the delinquent tax list is to be published, in conformity with the provisions of chapter 67, Laws of 1897, and the said publishing is hereby let to the publisher of the Emmons County Record at the rate of 15 cents for each description; and it is further resolved that the Emmons County Record furnish a bond to the county of Emmons in the sum of \$5,000, conditioned for the correct and faithful performance of the said publishing of said tax list." It is conceded that this resolution represents the only action ever taken by the county board with respect to any of the matters mentioned in the resolution, and further conceded that said resolution was not adopted at either a regular or adjourned session of the board. It appears that the resolution was in fact adopted at a time when the commissioners were assembled pursuant to a call or notice from the county auditor of said county, which is as follows: "Notice is hereby given that the board of county commissioners is called to convene on June 5th, 1897, for the purpose of fixing the amount of bond, and approving the same, required to be given by the publisher of the delinquent tax list under the provisions of chapter 2, Laws of 1897, and also for the transaction of any other business that may come before the board." This notice was issued and signed under the authority conferred upon county auditors by section 1898 of the Revised Codes of 1895; and there is no suggestion in the record that the notice was not regularly served upon all members of the board, nor that any member was absent when the resolution was adopted. The claim of counsel, as stated in his brief, is that "the call did not show that the purpose of the meeting was to designate a newspaper for the publication of the delinquent tax list," and upon this assumption counsel deduces the conclusion that the board was without authority to designate a newspaper at said special session. The statute requires that the auditor's call of a special session shall embrace a notice of the "time and object of the meeting." Section 1898, *supra*. A perusal of the notice shows that both of these requirements were embraced in the call in question. The objects of the session were stated in the call as follows: "For the purpose of fixing the amount of bond, and approving the same, required to be given by the publisher of the delinquent tax list under the provisions of chapter 2, Laws of 1897, and also for the transaction of any other business that may come before the board." The object of the meeting as thus set forth in the call was certainly a lawful object, and hence no discussion is needed to show that the board, when it met on the day designated, was lawfully assembled in special session. But counsel lays particular emphasis upon the point that the call did not in terms declare "that the purpose of the meeting was to designate a newspaper for the publication of the delinquent tax list." This criticism of the call is entirely correct.

and we are convinced that, unless the matter of designating a newspaper is fairly germane to the objects of the meeting as set out in the call, the board at such special session was without authority to designate a newspaper. The call, in our opinion, is not, as plaintiff's counsel argues, alone intended to apprise members of the board of the time and objects of the session. Its further purpose is to advertise the meeting by posting or publishing notices of the same, and such requirement manifestly is primarily and chiefly for the purpose of giving notice to the public, and especially to the citizens and taxpayers of the county, of the time and object of the special session, to the end that all interested persons may attend the meeting, and know in advance what business will be transacted at such meeting. Nor do we think the general statement in the call to the effect that the meeting was called for the "transaction of any other business that may come before the board" will aid this notice, or would justify the transaction of business wholly foreign to the object of the special session as stated in the call. It is noticeable that the discretion to call a special session is not vested in the board, but is vested in the county auditor, and that the latter is not authorized to call such a session at his pleasure, but only when the "interests of the county demand it;" nor can a lawful call be made, in our judgment, by the use of mere general terms, such as those employed in the latter part of the call in question, and which wholly fail to apprise the public of the particular object of the meeting. In discussing a similar call it was said in *Hayden v. Noyes*, 5 Conn. 391: "It is the purpose of the law not to prescribe a frivolous form, but to prescribe substantial information." See *Bloomfield v. Bank*, 121 U. S. 138, 7 Sup. Ct. Rep. 865, 30 L. Ed. 923; *Little v. Merrill*, 10 Pick. 543; *Insurance Co. v. Westcott*, 14 Grav. 440. In *Dill. Mun. Corp.* (3d Ed.) 268, the rule is stated as follows: "When the statute requires the notice to specify the business to be done, an omission to comply with that requirement makes the meeting void. A notice 'to do any other business' is insufficient, and acts and votes of the meeting held under it are of no binding force. Indeed, the rule is that, when the statute requires the business to be stated in the warning or notice, this is absolutely essential, and the meeting must be confined to these matters." The author cites an array of cases in support of this statement of the rule. We deem the rule as above stated to be entirely in harmony with the legislative purpose, and one that rests upon a solid basis of reason as well as judicial authority. In our judgment, to hold that a county board at a called session may lawfully transact any proper county business not referred to in the call would necessarily defeat the obvious purpose of the law, viz: that of apprising the public at large of the particular character of the business to be done at a called session. The evil of any such lax rule of construction is well exemplified in a case decided by the Supreme Court of the territory. See *Territory v. Steele*, 4 Dak. 78, 23 N. W. Rep. 91. In that case a special session of the county commissioners was

called "for the purpose of acting on applications for liquor licenses and other important business." Under this call the board met, and issued a notice of a special election, to be held under a special law, to vote upon the question of issuing county bonds to the amount of \$20,000. The court in the case cited animadverted with severity upon the action taken by the board upon a matter entirely outside of and foreign to the object of the session as stated in the call. Authorities cited by counsel showing what action may be taken by county boards at an adjourned session are not pertinent to the question under consideration, for the reason that the legislature has not attempted to safeguard the citizen by any special provisions of law limiting the action which may be taken at adjourned sessions.

Applying the strict rule as above laid down to the facts of this case, we are to determine whether the call issued by the county auditor of Emmons county, when fairly construed, was sufficient to apprise the public of the fact that a newspaper would be designated at such session, in which the delinquent list in question would be published. We have seen that the call did not state such object in terms, and hence the same cannot be regarded as a model call for such purpose. It must be further conceded that the reference in the call to chapter 2 of the Laws of 1897 does not tend to make the call definite as to the object of the session. Said reference to chapter 2 is, however, an obvious clerical error, as that chapter does not mention either a delinquent tax list or a bond, but is confined wholly to criminal legislation. But we do not think a direct reference to the chapter of the law under which action was to be had was essential to a valid notice, and hence, for the purposes of this case, we shall eliminate, as surplusage, the clause in the call which refers to chapter 2 of the Laws of 1897. After throwing out this reference, the purpose of the meeting was stated in the call as follows: "For the purpose of fixing the amount of bond, and approving the same, required to be given by the publisher of the delinquent tax list." It must be remembered, in this connection, that the public is chargeable with knowledge of the provisions of the laws of the state, and hence this notice must be construed with reference to this legal presumption. Chapter 67 of the Laws of 1897 made provision for the publication of a delinquent tax list of taxes on real estate which became delinquent in 1895 and prior years, and the same chapter required the commissioners to let the contract for the publication of the list, and also to fix the amount of the publisher's bond, and approve the same. The public, being advised of these statutory provisions in advance of the publication of the auditor's call, will be presumed to have read the call in the light of the provisions to which the call, by its terms, directed especial attention in unmistakable language. But the statute to which public attention is thus directed contains a further provision relating to the publication of such delinquent list, which is found in section 4 of the act, and is as follows: "The newspaper in which such publication shall be made shall be designated by a resolution of the

board of county commissioners of the county in which the taxes are laid." It appears, therefore, that chapter 67 of the laws of 1897 required the county commissioners (1) to let the contract for the publication of the delinquent tax list, and (2) to take and approve a bond from the contractor, and finally to designate the newspaper in which the delinquent list should be published. Construing these provisions together, and keeping in view the fact that the public is presumed to be advised of the same, we are of the opinion that the call for the special session of the board, when fairly construed in the light of the statute, was sufficiently definite in its terms to apprise the public that the board at such session would proceed, under said statute, not only to fix the amount of the publisher's bond and approve the same, but to let the contract to some party who would bind himself to publish the list in a proper manner, and in some newspaper to be then designated by the commissioners, if none had been theretofore designated by them; and in this case the designation had not been made prior to the date of the called session. We think the several duties of the commissioners required to be done by the act of 1897 in the matter of the publication of the delinquent list are very closely linked together, and are in their nature so associated that to mention one of such duties would suffice to suggest all of the same. We are therefore of the opinion that the public, having been informed by the terms of the call that the commissioners at such session would proceed to fix the amount of and approve the bond "required to be given by the publisher of the delinquent tax list," were further sufficiently advised by the call that the board would then and there do the other acts and things required of them in and about such publication, including the duty of designating a newspaper in which the party giving the bond would be required to publish the list. We think the act of designating the newspaper is so directly connected with the specific acts named in the notice that the public was bound to know that such designation must precede the specific acts. No bond could be approved until it was given, and no bond could be given until the contract for the publication was closed; and, as a practical business matter, such contract ordinarily would not be closed until the newspaper in which the publication should be made had been agreed upon and designated.

Respondents' counsel states his third point as follows: "The county auditor did not file in the office of the clerk of the District Court of Emmons county a certified copy of any resolution of the board of county commissioners designating a newspaper for the publication of the delinquent tax list." Section 4 of chapter 67 required that a copy of the resolution designating the newspaper in which the list should be published shall be filed in the office of the clerk of the District Court, and that such copy should be certified to by the auditor. Pursuant to this requirement the county auditor addressed to the clerk of the District Court a written communica-

tion as follows: "To D. R. Streeter, Clerk of the District Court—Dear Sir: In conformity with section 4, chapter 67, Laws of 1897, you are hereby notified that the following resolution was adopted by the board of county commissioners at their meeting on June 5th, 1897." Here followed a copy of the resolution of the board, already set out at length, and to this was appended the following: "Witness my hand and seal this 23rd day of July, 1897. Edward Braddock, County Auditor Emmons Co., N. D." And to this was affixed the auditor's official seal. We think this is a substantial compliance with the statute. By it the auditor notified the clerk and the public, under his hand and seal, that the resolution in question was adopted by the board. The law does not prescribe any form of certificate, and hence the auditor was at liberty to employ any terms which would fairly meet the statutory mandate. That he has substantially done so by this certificate we think is self-evident, and we therefore cannot sustain this contention of counsel.

Counsel states his fourth point as follows: "Point 4. The judgment entered against each tract of land was largely excessive and unauthorized, and that appears on the face of the judgment." The facts found in the record upon which this proposition of counsel is based may be condensed and stated as follows: From an affidavit made by counsel for the respondent, which is embraced in the motion papers, and upon which the District Court acted in making its order vacating the tax judgments in question, it appears that the several judgments in question are excessive in amount, and that such excess is caused by the addition of certain sums by way of interest and penalties, which are largely in excess of any sums legally chargeable against the lands. For example, it so appears that, as to the tax of 1889, only 90½ per cent. was legally chargeable as interest and penalties, and that such per cent., and no more, could lawfully be added to the amount of the original tax, whereas the affidavit shows that 143 per cent. was in fact added to the original tax and was embraced in the judgment; and the affidavit further shows that the other judgments were also largely excessive, by the addition thereto of excessive and illegal penalties and interest. Said affidavit further states facts tending to show that many of the taxes for which said judgments were entered were not legal taxes, and had not been lawfully levied. We deem it unnecessary to enter into the particular defects in the tax levies which are claimed by counsel and set forth in the motion papers. It will suffice to say, in general terms, that in our judgment it appears that not many of the taxes were vulnerable to a proper attack. Some of them, at least, appear not to have been lawfully levied. Of course, a valid assessment and levy are essential to a valid tax, and we are satisfied that many of the judgments in question could not have been legally entered if the facts showing the existing defects in the tax proceedings had been brought to the attention of the trial court while the action was pending in the District Court, and before the judgments were entered thereon. But it not appearing

that this was done, nor that there was an appearance in the action, we must assume, in support of these judgments, that they were entered by default, and therefore are based upon the evidence which the statute (section 9) declares to be *prima facie* evidence that "all the provisions of the law in force at the time of such assessment and levy in relation to the assessment and levy of the taxes" had been complied with. The list itself is made *prima facie* evidence of these important facts, and the list alone, being on file, would authorize the entry of these judgments, in the absence of any rebutting evidence. The delinquent list, on its face, shows the amount of the original tax for each year, the amount of interest and penalty thereon, and the total amount; and, as has been seen, the list itself is *prima facie* evidence that the taxes, etc., appearing thereon are valid. The postulate of counsel on this branch of the case is, and must be, that in entering these tax judgments the District Court was without jurisdiction to do so. This assumption rests upon two other assumptions, viz: First, that the court had no legal authority to enter judgment for any tax appearing on the tax list, if the same was an invalid tax on account of any fundamental defect in the tax proceedings leading up to such tax; and, secondly, that, in cases where the court had jurisdiction over a tax on the list, it would immediately lose and forfeit such jurisdiction if it attempted to enter judgment in a sum in excess of the legal amount due. This court cannot yield its assent to either or any of these assumptions, for the reason that we consider them each and all fallacious, and to uphold them, or either of them, would, in our opinion, defeat every valuable feature of the law of 1897. The purpose and scope of that statute are to give the taxpayer his day in court, and to afford him an opportunity to demand a judicial determination of any and all questions touching the legality of taxes against his land which appear upon the delinquent list required to be filed with the clerk of the District Court. For this purpose an action is commenced against the land, and the taxpayer has legal notice of its pendency. He is provided with a simple procedure. He is permitted to appear and answer, and is given an opportunity to introduce any competent evidence bearing upon the legality of any tax appearing on the list in which he is in anywise interested. The court in which the action is heard is clothed with authority to determine that any tax on the list is invalid, either in whole or in part, and, if found invalid, to annul the same; and the court is therefore necessarily competent to declare that any tax on the list is a valid tax, and to enter a judgment for the amount thereof. Having authority to adjudicate, it will follow that it may possibly erroneously adjudicate in some cases; and, in contemplation of such a contingency, the law points out methods of correcting errors which may be made in such cases. It is well settled that the jurisdiction of the court in this class of cases in no wise depends upon the validity of the tax proceedings involved, nor does it depend upon the taxability of the land against

which the judgment is rendered. See *In re St. Paul & D. R. Co.* (Minn.) 6 N. W. Rep. 454; *Chauncey v. Wass* (Minn.) 30 N. W. Rep. 826; *Wallace v. Broten*, 22 Ark. 118; *State v. Sargent*, 12 Mo. App. 228; *Gage v. Parker*, 103 Ill. 528. Counsel cites in support of his contention Blackw. Tax Titles, §§ 354, 355. These citations embody a statement of a certain rule of law relating to the jurisdiction of courts, which is well settled, and which is to the effect that, where a court of general jurisdiction "acts under special and summary powers derived wholly from statutes," it is incumbent that such jurisdiction should be made to appear affirmatively. To this rule we yield our assent, but we are unable to see its pertinency to any feature of the case which arises under the fourth point of the respondents' brief, which is here under discussion. We are unable to understand how the court, clothed as it is with plenary power to hear and determine whether a tax appearing on the list is valid or invalid, and to enter a judgment accordingly one way or the other, is divested of its power in all cases whenever and as soon as it is made to appear that a given tax on the list is invalid. Nor do we see how a judgment entered for an amount in excess of a tax legally due can operate to render a judgment void on its face. It may be true that a judgment for taxes which is excessive in amount may, as in other cases, be corrected by motion in a case where such illegality has not been waived, or the right to attack the judgment lost by laches, or otherwise lost; but, however this may be, there can be no doubt that entering such a judgment for too much would not itself operate to oust the court of its jurisdiction, and thereby render the judgment void.

We find nothing in this record showing that the District Court for Emmons county was without jurisdiction to enter the tax judgments in question, and it must follow that the order of the District Court vacating such judgments and setting aside the tax sales made thereunder, on the ground that the same is void, was erroneously made; and we therefore direct the District Court to enter an order reversing the order appealed from, and to enter an order denying the application herein to vacate said tax judgments. Appellant to recover its costs and disbursements in both courts. All the judges concurring.

ON PETITION FOR REHEARING.

In denying the petition for a rehearing in this case, we briefly notice the points vigorously urged by counsel, and upon which he bases his petition. We fully appreciate the fact that the authorities are in conflict as to whether or not in these special tax proceedings a judgment is conclusive as to the validity of the tax upon which it is based. We took our statute from the state of Minnesota, almost verbatim, and after it had been there settled by a long line of decisions that judgments under the statute were conclusive as to such matters. Under a familiar canon of construction, we took the statute with the construction there placed upon it.

We adhere to our view that the notice of the special meeting of the county commissioners was sufficient, and that the designation of a newspaper in which the delinquent tax list should be published was germane to the matter specified in said notice. True, there is another delinquent tax list known to our law, and frequently mentioned in our statutes. But there is no other delinquent tax list wherein the publisher is required to give bond for its faithful publication, and when the notice recites that it was "for the purpose of fixing the amount of the bond, and approving the same, required to be given by the publisher of the delinquent tax list," it could refer only, to the delinquent list under this special statute. It was not necessary that this notice should fix the hour of meeting. Section 1898, Rev. Codes 1895, fixes the dates for the regular meetings of the board. No hour is mentioned. If the time for special meeting is equally definite, it is sufficient. Nor was it necessary that publication of this notice should appear in the court proceedings. It had no place there. The statute designates what must appear therein, and nothing more need affirmatively appear.

Equally clear are we that an error in the amount of the judgment does not render the judgment void. Jurisdiction to enter judgment in these special proceedings being once established, jurisdiction to err in computation follows just as surely as in cases where original jurisdiction is presumed. But under this statute (chapter 67, Laws 1897) the clerk has nothing to do with computing the amount of penalty and interest. Section 1 requires the treasurer to make that computation, and his list must show the amount as to every tract. Section 3 makes a true copy of this list a part of the published notice that constitutes service in the case, and such notice calls upon every person interested in any land included in the list to set forth any objection or defense he may have to said tax or any portion thereof, or the penalties or interest thereon. If no appearance be made, section 6 requires the clerk to enter judgment for said amount, adding the statutory costs. The list stands as the complaint. The amount specified in the list is the amount claimed in the complaint. The list, under the statute, proves itself. The clerk made no errors of computation.

Finally, and to reiterate from the opinion, the motion to vacate in this case went upon the ground that the judgment was void. There was no appeal to the favor. There was no opportunity to exercise or abuse discretion. The whole attack was upon the ground that the judgment was void for want of jurisdiction. The order appealed from was based upon that ground. If we should concede—which we do not—that some of the grounds of motion might be available upon an appeal to the favor, yet no such appeal was made. The petition is denied.

(84 N. W. Rep. 379.)

EMMONS COUNTY vs. HIRAM R. THOMPSON, *et al.*

Opinion filed November 13, 1900.

Tax Sales—Vacation of Judgment.

Construing certain sections of chapter 67. Laws 1897: This is an appeal from an order of the District Court for Emmons county vacating a real estate tax judgment, and a tax sale made thereunder, pursuant to said chapter, and allowing the owner of the real estate so sold to file an answer to the complaint in the action. The order vacates the judgment, and sets aside the sale, upon the express ground that the judgment is "null and void." The affidavit upon which the order is based embraces averments tending to establish the following facts: (1) That the owner of the land is a non-resident, and had no actual notice of the pendency of the action in which said judgment was entered until long subsequent to the entry of judgment; (2) that the judgment was entered by the clerk of the District Court, and so entered without an order or direction so to do from the District Court or a judge thereof. (3) That the publisher of the newspaper in which the delinquent tax list was published did not, prior to the entry of the judgment or at all, file with the clerk of the District Court the requisite number of copies of the newspaper in which such list was published, as required by section 4 of said chapter. (4) That the taxes appearing upon said delinquent list, and for which said judgment was entered, were illegal and void, in whole or in part, on account of certain fundamental defects in the tax proceedings relating to the assessment and levy of the taxes appearing on the delinquent list, and for which taxes the judgment was entered. *Held*, upon this state of facts, that the order vacating the judgment and the sale made thereunder was erroneously made, and that none of the grounds above mentioned and stated in the affidavit operated to defeat the jurisdiction of the District Court to enter such judgment.

Publication the Delinquent List—Judgment by Default.

After an affidavit showing the publication of the delinquent list had been filed, the clerk of the District Court, under the authority conferred by section 6 of the act, proceeded to enter judgment by default against the land in question for the taxes, interest, and penalty appearing on the list. *Held*, that the fact of publication, coupled with the filing of the requisite affidavit of publication, conferred authority to enter such judgment; and, further, that the additional evidence of publication, to-wit: the filing of the several copies of the newspaper, is not a pre-requisite to the entry of a judgment by default. Such newspapers could lawfully have been filed later in the action *nunc pro tunc*.

Order for Judgment Unnecessary in Tax Matters.

Held, further, that in entering such judgment the clerk of the District Court acted in a ministerial capacity, and upon competent *prima facie* evidence of the validity of the taxes, viz: the statutory evidence. See section 9 of chapter 67. No evidence of the validity of a tax other than the statutory evidence would be competent in a default case. In such a case an order to enter judgment is not required by the act, and such an order would be without validity or effect.

Motion to Vacate Default—Affidavit of Merits—Verified Answer.

Held, further, and upon the assumption that the judgment was irregularly entered, and hence vulnerable to a proper attack thereon if one had been seasonably made, that it is nevertheless true that no

attack is here made upon this judgment on the ground of mere irregularity, nor can the order be sustained on such ground. Neither an affidavit of merits or a proposed verified answer was filed or presented to the District Court as a basis for the motion to vacate. This omission is fatal where the motion is based upon a mere irregularity. Nor could the sale be set aside upon any ground of mere irregularity in the entry of the tax judgment. Section 15, chapter 67, Laws 1897.

Appeal from District Court, Emmons County; *Winchester*, J.

Action by the County of Emmons against the S. W. $\frac{1}{4}$ of section 22, township 133 N., of range 76 W., Hiram R. Thompson, and another. Judgment for plaintiff. From an order vacating said judgment, plaintiff appeals

Reversed.

George M. Register and Cochrane & Corliss, for appellant.

The judgments are not void because the county treasurer did not immediately after the passage and approval of the law make and file in the office of the District Court of his county a list of delinquent taxes upon real estate. The provision of this section is directory. *Banning v. McManus*, 53 N. W. Rep. 635; *Kipp v. Dawson*, 31 Minn. 380; 23 Am. & Eng. Enc. L. 458; Suth. St. Cr. § 446; *Johnson v. Day*, 2 N. D. 295-299; *Hennepin County v. Baldwin*, 65 N. W. Rep. 80; *State v. Lean*, 9 Wis. 392. The resolution of the board of county commissioners designating the paper was sufficient. *Kipp v. Dawson*, 60 N. W. Rep. 845. The resolution designating the paper is not void because the same was adopted at a special meeting of the board. The object stated in the notice appearing in the record is plainly an object to proceed to business under the provisions of chapter 68 of the Laws of 1897. The notice contains a general statement that the object of the meeting is to transact any other business that may come before the board. All the members of the board were present at the special meeting and decided to transact general business. When the board unanimously decided to take up general business, all the rules governing such bodies are applied to their deliberations, and a mere majority may adopt a measure the same as at other meetings. *White v. Fleming*, 114 Ind. 574; *Wilson v. Board*, 68 Ind. 507; *Prezinger v. Harness*, 114 Ind. 494; 1 Dill. Mun. Corp. 202; *Stow v. Wysce*, 18 Am. Dec. 1013 and note; *Pike County v. Roland*, 94 Pa. St. 238; *Douglas v. Baker County*, 23 Fla. 419, 2 South. Rep. 776; *People v. Carver*, 2 Colo. App. 136; *Jones v. Cullen*, 142 Ind. 335. At any rate the record does not show that any member of the board was absent, or that any member of the board objected to take up the subject of designating a newspaper in which to publish the notice. It appearing that a meeting of the board was held at which business was transacted, which it only had a right to do at a legal meeting, it will be presumed, if necessary, and nothing to the contrary being shown, that all its members were present and acted. *Prezinger v. Harness*, 114 Ind. 494; *Lewick v. Glazier*, 74 N. W. Rep. 717; *Tierney v. Brown*, 17 Am. St. Rep. 679. The claim that judgment

was entered for an excessive amount is, of course, a claim that does not affect the jurisdiction of the court. No judgment is void because it is entered for a larger amount than it should have been entered for. *Shattuck v. Smith*, 6 N. D. 56; *Kipp v. Dawson*, 31 Minn. 377. The contention that the affidavit annexed to the list is defective is entirely without merit. *Reimer v. Newell*, 49 N. W. Rep. 865; *Kipp v. Dawson*, 32 Minn. 380.

J. E. Robinson, for respondents.

The county treasurer of Emmons county did not immediately after the passage and approval of chapter 67, Laws 1897, make and file in the office of the clerk of the District Court of his county, a list of taxes upon real estate as required by section one of the act, and no such list was filed until six months after the passage and approval of the act. He did not annex to the list an affidavit as required by statute. The newspaper in which the tax list was published was never designated by resolution of the board of county commissioners of Emmons county. *Cass County v. Security Improvement Co.*, 7 N. D. 528. The resolution of the board designating a newspaper was passed at a special session held on June 5th, 1897, under a call from the county auditor. Nothing was said in the call of the designation of a newspaper for the publication of the delinquent tax list. The call not specifying such object, the act of designation of a newspaper was void when had at this special meeting. § 1898, Rev. Codes; *Thomp. Corp.* § § 707-709-710-717-718; *Angel & Ames, Corp.* § 489; *Dillon, Mun. Corp.* § 265; *School District v. Atherton*, 12 Metc. 105; *Little v. Merrill*, 12 Pick. 543; *Perry v. Dover*, 12 Pick. 206; *Bloomfield v. Charter Oak Bank*, 121 U. S. 121. The judgment entered against each tract of land was largely excessive and unauthorized. It must appear from the recitals of the record that the facts existed which authorized the court to act, and that in acting the court kept within the limits of its lawful authority. *Cooley on Taxation* (2d Ed.) 526; *Blackw. Tax Titles*, § § 354-355; *McClum v. Ross*, 5 Wheat. 116; *Thatcher v. Powell*, 6 Wheat. 119. When a statute authorizes a proceeding which was not allowed by the general law before, and directs the mode in which the act shall be done, the mode pointed out must be strictly pursued. *Suth. St. Cr.* § 454. When the power to effect property is conferred by statute upon those who have no personal interest in it, such power can be exercised only in the manner and under the circumstances specified. *Koch v. Bridges*, 45 Miss. 247; *United States v. Wyngall*, 5 Hill. 16; *Gilpin v. Abbott*, 6 Mich. 17; *In re Selby*, 6 Mich. 193; *O'Donnell v. McIntyre*, 37 Hun. 615; *Whitney v. Thomas*, 23 N. Y. 287. A notice of a special meeting of "the transaction of any other business that may come before the board" is not sufficient. *Hayden v. Noyes*, 5 Conn. 391; *Bloomfield v. Charter Oak*, 121 U. S. 132; *Willard v. Kinneyworth*, 8 Conn. 247-254; *Little v. Merrill*, 10 Pick. 543; *Reynolds v. New Salem*, 6 Metc. 340;

Peoples Mut. Ins. Co. v. Westcott, 14 Gray, 440; *Dill. Mun. Corp.* § 268; *Jones v. Andover*, 9 Pick. 146; *Rand v. Wilder*, 11 Cush. 294; *Hunt v. School District*, 14 Vt. 300; 39 Am. Dec. 225; *Hosdell v. Hancock*, 3 Gray, 526; *Terry v. Milbury*, 21 Pick. 64; *Blackburn v. Wadpole*, 9 Pick 97; *Baker v. Shepard*, 24 N. H. 208.

WALLIN, J. The order appealed from bears date December 5, 1899, and in terms vacates and sets aside a certain tax judgment, and a tax sale made thereunder, and allows the owner of the tract of land involved to file an answer to the complaint in the action. The land involved is situated in Emmons county, and belongs to one Hiram R. Thompson, and is described as follows: The S. W. $\frac{1}{4}$ of section 22, in township 135, of range 75. The order of the District Court was based wholly upon an affidavit made by one Henry A. Armstrong, and the order contains the following recital: "It appearing to the court that the allegations and material statements set forth in the affidavit of Henry A. Armstrong therein are true, and that the judgment rendered, and the sale made thereunder, are null and void," etc. Then follows the order vacating and setting aside the judgment and sale, and allowing the owner to file an answer. The judgment referred to in the order is a certain tax judgment against the land above described, which was entered on the 14th day of October, 1897, and the tax sale thereunder was made on December 6, 1897. The judgment was entered and sale made under the provisions of chapter 67 of the Laws of 1897, authorizing the District Court, under conditions named in said chapter, to enter judgments against lands for taxes thereon which became delinquent in 1895 and prior years. The record shows that no counter affidavits were filed in the District Court, and, so far as appears, none of the records in the tax case was offered in evidence before the District Court at the hearing which culminated in the order in question. We are therefore confined, in passing upon the case, to the averments embraced in said affidavit of Henry A. Armstrong. In our judgment, the case can properly be disposed of on its merits, without quoting said affidavit in full, nor shall we do more than set out the substance of such allegations therein as are deemed pertinent to the controlling questions which are presented for determination. By the terms of said order, the District Court has wholly vacated and set aside said tax judgment and sale, and it appears that this was done because, in the opinion of that court, said judgment was not merely irregular, but was "null and void." This is, of course, tantamount to a declaration that the court in entering said tax judgment was without jurisdiction to enter the same, for the reason that a judgment entered by a court of competent jurisdiction, and which is intelligible in its terms, is not, and cannot be, absolutely "null and void." The affidavit upon which the order was based also declares, in terms, as follows: "Affiant further states and alleges that the said judgment so entered as aforesaid was and is void for the following reasons, to-wit," etc. We call particular attention to the terms of the affidavit and the

order, for the purpose of showing that neither the court below nor counsel for the moving party regarded the application as one made to the favor of the District Court, or as one based upon a mere irregularity of procedure. The application, on the contrary, was made and granted expressly upon the theory and ground that the judgment was void, and we shall therefore so treat the case in this court. But, in confining ourselves to the one matter of jurisdiction, we do not desire to suggest that this particular judgment was or is vulnerable to attack upon any ground of mere irregularity in entering the same. Irregularities in entering judgments may be cured if properly and seasonably pointed out to the court in which they occurred, but the right to do so is often lost by the lapse of time, by laches, and other causes.

Nor do we discover in this record any evidence that the judgment in question was irregularly entered. It was a default judgment, and was entered upon all the evidence which is ever introduced, or can lawfully be introduced, in any case of default arising under the act of 1897. The evidence consisted of the verified delinquent tax list required to be filed by the county treasurer in the office of the clerk of the District Court. By the terms of the statute, the filing of such list not only operates to commence an action against the land to recover a judgment for taxes, but also to give notice of the pendency of such action to all parties interested in the land; and, by its express language, the list so filed is further made *prima facie* evidence that all the provisions of the law in relation to the assessment and levy of the taxes referred to in the list, which were in force when the same were assessed and levied, "have been complied with." This evidence was before the District Court when the tax judgment in question was entered, and no rebutting evidence being offered, and no objection being made to the entry of the judgment, we are unable to see wherein the judgment was erroneously entered or was in any respect irregular. True, the affidavit on which the District Court based its order vacating the judgment sets out facts which tend strongly, and perhaps conclusively, to show that the taxes, as shown by the delinquent list, were never lawfully assessed, equalized, or levied, and we may assume, for the purposes of this decision, that many of the taxes, if not all, for which said judgment was entered, were voidable by reason of fundamental defects in the tax proceedings upon which the same were based. But this concession in no wise militates against the regularity of the tax judgments. None of the alleged defects in the taxes were pleaded by answer or otherwise brought to the attention of the court entering the judgment, and we have seen that there was competent evidence that the taxes were lawfully assessed and levied.

The owner, who was a nonresident, received the same notice which any owner, whether resident or nonresident, ever can receive in such an action. The statute makes the filing of the list constructive notice of the pendency of the action to all parties interested in the land, and jurisdiction of the res is acquired by

publishing the delinquent list, which embraces a description of the lands involved. The action is strictly in rem, and, as it is instituted as a mode of collecting taxes by means of judicial proceedings, a personal notice would be impracticable, and, under the authorities, such notice may be dispensed with entirely in such proceedings. Nor is personal notice required in actions in rem which do not relate to the collection of the public revenue. The law in its entire scope proceeds upon the theory that in many cases no actual notice of the pendency of the action to recover the tax judgment against the land will be received by the owner of the land, and it is entirely elementary that actual notice is not essential, and that statutory notice alone will confer jurisdiction to enter the judgment. To sustain this proposition, the case of *Dousman v. City of St. Paul*, 23 Minn. 394, is in point. But the motion, if regarded as either an appeal to the favor, or an application to vacate a judgment for a mere irregularity, could not, in any court, have been lawfully granted, for the reason that the motion to vacate was not based upon either an affidavit of merits or upon a proposed verified answer. See *Sargent v. Kindred*, 5 N. D. 8, 63 N. W. Rep. 151; *Kirschner v. Kirschner*, 7 N. D. 291, 75 N. W. Rep. 252; *Railroad Co. v. Blackmar*, 44 Minn. 514, 47 N. W. Rep. 172.

Turning to the matter of jurisdiction, we have carefully read and considered the affidavit upon which the order vacating the judgment is based. With certain exceptions hereafter to be considered, it embraces allegations showing, or tending to show, that the taxes for which said judgment was entered were illegal and voidable by reason of certain fundamental defects in the tax proceedings. We have, however, already said that none of the alleged defects in the tax proceedings were brought to the attention of the trial court at any time prior to the entry of the judgment; and it is abundantly established by judicial opinion that the jurisdiction of the District Court to enter a judgment for such taxes would not have been ousted, or in any wise affected, if any and all such defects had been pleaded by way of answer and defense in the action in which the judgment was entered. A total failure to assess or levy a tax would be a good defense, if set up by answer and proven at the trial. In such a case, the court would refuse to enter a judgment because in the supposed case the plaintiff, on issue joined, would fail to make out a case. But no question of jurisdiction arises upon such an issue. See *In re St. Paul D. R. Co.* (Minn.) 6 N. W. Rep. 454; *Chauncey v. Wass* (Minn.) 30 N. W. Rep. 826; *Wallace v. Brown*, 22 Ark. 118; *State v. Sargent*, 12 Mo. App. 228; *Gage v. Parker*, 103. Ill. 528.

But the affidavit presented to the District Court, after stating that said tax judgment was entered by default against said land by the clerk of the District Court of Emmons county, proceeds as follows: "That, at the time of the rendition of said judgment by said clerk as aforesaid, the said clerk was not the judge of any court, and did not enter said judgment agreeably to the order

of any court or judge of any court; * * * that said judgment, as affiant believes, is void upon its face, because it shows that it was not rendered by any judge, court or judicial officer."

The judgment was entered pursuant to section 6, chapter 67, Laws 1897, which declares: "Upon the expiration of thirty days from the last publication of such notice and list the said clerk shall, the affidavit of publication being filed, enter judgment against each and every one of such pieces or parcels as to which no answer shall have been filed, which judgment shall include all of such pieces or parcels." We are of the opinion that the contention of counsel to the effect that this judgment was not entered by the court, for the reason that the clerk who entered it in the judgment book was not in terms directed to enter the same, either by the District Court or a judge thereof, is untenable. The contention goes to the constitutionality of the statute under which the judgment was entered. This action was strictly in rem, and in such cases actual notice to individuals interested in the res is never indispensable. See *Emmons County v. Lands of First Nat. Bank of Bismarck* (decided at this term) 84 N. W. Rep. 379. Under chapter 67b, the law declares that the only notice to individuals interested in the land of the pendency of the action is given by filing a verified delinquent list with the clerk of the District Court. The act of filing operates as constructive notice to the land-owner, and also to commence an action in rem against the land itself. The publication of the delinquent list, under the statute, is all that is needed to give the District Court Jurisdiction over the land for the purposes of hearing the case and entering a judgment against the land for the amount of the taxes against each tract, as the same are stated on the verified list. No judgment in personam can be entered under the act. True, the court cannot enter any judgment without proof that the taxes appearing upon the list are valid taxes, and, if the proof offered by a landowner who voluntarily appears shows that a tax is void, the court would err if it entered judgment for the same. In the case at bar, however, no appearance was made, and no answer alleging a defense was filed. The case being strictly a default case, the evidence, consisting of the verified delinquent list, was all the evidence required in behalf of the plaintiff, and the same was sufficient, under the statute, to establish prima facie the validity of the tax against the land in question. Had the court or judge assumed to direct the entry of the judgment, but one direction was possible or could lawfully have been given upon the evidence in the case. The law and the evidence together required the entry of a judgment for the plaintiff, and the order of a court or judge must necessarily have conformed to the mandate of the statute, and hence the court would be powerless to do more than direct the entry of the judgment which was entered. In such a case a direction to enter would be an idle form, and purely perfunctory, nor would the same possess any element of actual deliberation. The statute has dispensed with any such useless formality

by directing the clerk to enter judgment for the taxes on the delinquent list in all cases of default for answer. In doing so, the law assumes that all parties interested in the land, having had the requisite statutory notice, have assented to the entry of judgment against the land for taxes against it appearing on the delinquent list. The judgment, therefore, in this class of cases, is in legal theory a judgment entered by consent, and in such cases a judgment may be entered without an order of court, except in cases where the statute requires such an order. In this state no such order is required in actions arising under chapter 67, *supra*, and a contrary rule is plainly implied by the provisions of section 9 of the chapter.

Chapter 67 is very nearly an exact transcript of a statute of the state of Minnesota, in which state judicial power is not vested in clerks of court, but is vested by the constitution of the state in certain judicial officers corresponding in name and authority to those in this state. The statute has been before the Supreme Court of Minnesota for construction and been construed by that court in many cases, and in no case has the power of the clerk to enter a default judgment been questioned. In our opinion, it is clear that the clerk, in entering a judgment by default under chapter 67, acts ministerially only, and that his power to do so, therefore, cannot be questioned on constitutional grounds.

Only one further point is presented by the affidavit which at all bears upon the jurisdiction of the court to enter the judgment. It appears by the affidavit that the delinquent list was published the requisite number of times in the Emmons County Gazette prior to the entry of judgment, but the affidavit in this connection charges that three copies of each number of the newspaper were not "filed or caused to be filed with the clerk of said court by the publisher of said newspaper, or by any other person, as required by law, or at all. Section 4, chapter 67, *supra*, provides that "the owner, publisher, manager or foreman in the printing office of the newspaper in which such notice and list shall be published shall make and file with the clerk of the District Court an affidavit of such publication, stating the day in which each publication was made, and shall also file with the clerk three copies of each number of the paper in which the notice and list shall have been published." There is no averment and no claim that the affidavit of publication required was not duly filed, and the question is presented whether the omission to file the requisite number of copies of the newspaper is fatal. We are clear that it is not. The jurisdiction over the land was acquired by the fact of publication, and not by any proof of that fact. The proof of publication in this case, viz: the affidavit, was duly filed, but, if it had not been, the proof could have been supplied at any time during the pendency of the action. The cases next below cited are directly in point, as supporting our views upon this feature of the case. *Hoyt v. Clark* (Minn.) 66 N. W. Rep. 262; *Frisk v. Reigleman* (Wis.) 43 N. W. Rep. 1117; *Fruit Exchange v. Stamm*

(N. M.) 54 Pac. Rep. 345; *Commissioners v. Morrison*, 22 Minn. 179. We shall therefore necessarily hold, upon the facts appearing upon this record and under the law applicable thereto, that the District Court erred in making the order appealed from, for the reasons and upon the grounds already stated; and, in so far as the order assumes to deal with and vacate the tax sale made under the tax judgment in question, the order is entirely erroneous upon said grounds and reasons, and for the additional reason that there is nothing in this record tending to show that after said judgment was entered, and before the sale, said judgment was satisfied in whole or in part. See, on this point, section 15 of chapter 67.

The order appealed from is in all things reversed, and the District Court is directed to enter an order reversing the same, and also enter an order denying the application made herein to vacate said judgment and tax sale, with costs of both courts to appellant. All the judges concurring.

ON PETITION FOR A REHEARING.

A petition has been filed asking for a rehearing of this case. The rehearing is not sought to enable the petitioner to present any new grounds or arguments to this court upon the question which was decisive of the case both in the District Court and in this court, viz: that of jurisdiction in the District Court to enter the tax judgment in question. That feature of the respondent's contention is abandoned, so far as appears from the petition. The grounds set out in the petition clearly indicate that the respondent desires an opportunity to contend in this court that said tax judgment was erroneously entered, and was in fact an illegal judgment, for the reasons referred to and discussed in the opinion of this court already handed down. The petition must be denied for various reasons, some of which will be briefly mentioned.

First, it appears that the ground assumed by the respondent in the petition was considered by this court and disposed of by the opinion handed down. This court distinctly held in its original opinion that the tax judgment entered by default was not in fact irregularly entered, but was, on the contrary, regularly entered, in conformity to the provisions of the statute, and upon such evidence as the law itself declares to be sufficient in a case where no appearance is made in the action, and where no defense to the tax is interposed by answer. Having discussed this feature of the case quite fully in the original opinion, we can see no good reason for reopening the case, inasmuch as reflection has served only to confirm our original views as expressed in the opinion of this court.

Only one further consideration will be noticed. The order of the District Court embodied an order vacating the tax sale, and incidentally annulling the certificate of sale delivered to the county of Emmons. This feature of the attempted adjudication made by the District Court is vital, and the same obviously constitutes the only element of the order in question which is of the slightest

practical value to the landowner. The motion was, it is true, nominally aimed at the tax judgment, but its real purpose manifestly was and is to get rid of and set aside the sale of the land, and wipe out the cloud upon the title created by the certificate of sale. But it appears that precisely two years, less one day, prior to making the order appealed from, said judgment had been paid in full and satisfied of record by a sale of the land upon which the judgment was made a specific lien. The judgment was never at any time of such a character that a general execution thereon could be issued either against lands or goods, and when the motion was made and decided below the judgment was a dead and valueless record, *i. e.* it was a judgment fully paid and satisfied. It is unnecessary to determine, in passing upon this petition, whether such a tax judgment is vulnerable to attack by mere motion, even when made on jurisdictional grounds, in a case where it appears, as in this case, that the real purpose of the moving party is to assail, not the judgment, but the tax sale made upon the judgment. In disposing of the questions presented by this petition, we are required to consider only whether a tax sale can be annulled by an order based on a motion to vacate a judgment in a case where the grounds of the motion do not relate to the jurisdiction of the court to enter the judgment, but are confined to certain alleged irregularities and illegalities in entering the judgment.

We have no doubt that a motion cannot be made available to accomplish such a purpose. We need offer but one of many reasons which suggest themselves as a basis of this conclusion, and this is found in the statute under which the sale is made. Section 15, chapter 67, Laws 1897, embraces this provision: "The certificate shall in all cases be *prima facie* evidence that all the requirements of law with respect to the sale have been duly complied with. And no sale shall be set aside or held invalid unless the party objecting to the same shall prove either that the court rendering the judgment, pursuant to which the sale was made, had not jurisdiction to render the judgment, or that after the judgment and before the sale such judgment had been satisfied; and such certificate shall be conclusive evidence that due notice of sale, as required by this act, was given, and that the piece or parcel of land was first offered at such sale to the bidder who would pay the amount for which the piece or parcel was to be sold for the shortest term of years; and the validity of any sale shall not be called in question unless the action in which the validity of the sale shall be called in question shall be brought, or the defense alleging its invalidity be interposed, within three years from the date of sale."

In this language two features are conspicuous which are directly pertinent here: First, it appears that but two grounds are mentioned upon which a tax sale made on a tax judgment can be lawfully assailed, *viz.*: for lack of jurisdiction in the court which entered the judgment; and, secondly, upon the ground that the

judgment had been paid before the sale. The other feature of the statute has reference to the manner in which the attack upon the sale can lawfully be made. The statute declares that the "validity of any sale shall not be called in question unless the action in which the validity of the sale shall be called in question shall be brought or the defense alleging its invalidity be interposed within three years from the date of the sale." This language leaves no room for doubt that the proper mode of attacking the validity of a tax judgment sale is by means of a civil action, and this mode is in accord with all well-established principles of procedure. Nor are the grounds of attack now under consideration sufficient to annul the sale, even by an action. All the judges concur.

(84 N. W. Rep. 385.)

EMMONS COUNTY *v.* EMMA C. CRANMER, *et al.*

Opinion filed November 13, 1900.

Appeal from District Court, Emmons County; *Winchester, J.*

George M. Register and *Cochrane & Corliss*, for appellant.

H. A. Armstrong and *Stevens & Allen*, for respondents.

PER CURIAM. The controlling questions in this case were involved and decided in the case of *Emmons Co. v. Thompson* (decided this term) 9 N. D. 598, 84 N. W. Rep. 385. The order appealed from is in all things reversed, and the District Court is directed to enter an order reversing the same, and also to enter an order denying the application made herein to vacate said judgment and tax sale, with costs of both courts to appellant.

(84 N. W. Rep. 1117.)

EMMONS COUNTY *v.* CHAS. H. DAVIDSON.

Opinion filed November 13, 1900.

Appeal from District Court, Emmons County; *Winchester, J.*

George M. Register and *Cochrane & Corliss*, for appellant.

H. A. Armstrong and *Stevens & Allen*, for respondents.

PER CURIAM. The controlling questions in this case were involved and decided in the case of *Emmons Co. v. Thompson* (decided this term) 9 N. D. 598, 84 N. W. Rep. 385. The order appealed from is in all things reversed, and the District Court is directed to enter an order reversing the same, and also to enter an order denying the application made herein to vacate said judgment and tax sale, with costs of both courts to appellant.

(84 N. W. Rep. 1117.)

EMMONS COUNTY *v.* CHAS. H. DAVIDSON.

Opinion filed November 13, 1900.

Appeal from District Court, Emmons County; *Winchester, J.**George M. Register* and *Cochrane & Corliss*, for appellant.*H. A. Armstrong* and *Stevens & Allen*, for respondents.

PER CURIAM. The controlling questions in this case were involved and decided in the case of *Emmons Co. v. Thompson* (decided this term) 9 N. D. 598, 84 N. W. Rep. 385. The order appealed from is in all things reversed, and the District Court is directed to enter an order reversing the same, and also to enter an order denying the application made herein to vacate said judgment and tax sale, with costs of both courts to appellant.

(84 N. W. Rep. 1117.)

EMMONS COUNTY *v.* I. P. BAKER.

Opinion filed November 13, 1900.

Appeal from District Court, Emmons County; *Winchester, J.**George M. Register* and *Cochrane & Corliss*, for appellant.*F. H. Register* and *H. A. Armstrong*, for respondents.

PER CURIAM. The controlling questions in this case were involved and decided in the case of *Emmons Co. v. Thompson* (decided this term) 9 N. D. 598, 84 N. W. Rep. 385. The order appealed from is in all things reversed, and the District Court is directed to enter an order reversing the same, and also to enter an order denying the application made herein to vacate said judgment and tax sale, with costs of both courts to appellant.

(84 N. W. Rep. 1117.)

EMMONS COUNTY *v.* LUTHER A. COUCH, *et al.*

Opinion filed November 13, 1900.

Appeal from District Court, Emmons County; *Winchester, J.**George M. Register* and *Cochrane & Corliss*, for appellant.*F. H. Register* and *H. A. Armstrong*, for respondents.

PER CURIAM. The controlling questions in this case were involved and decided in the case of *Emmons Co. v. Thompson* (decided this term) 9 N. D. 598, 84 N. W. Rep. 385. The order appealed from is in all things reversed, and the District Court is directed to enter an order reversing the same, and also to enter an order denying the application made herein to vacate said judgment and tax sale, with costs of both courts to appellant.

(84 N. W. Rep. 1117.)

EMMONS COUNTY *vs.* EMMA C. CRANMER, *et al.*

Opinion filed November 13, 1900.

Appeal from District Court, Emmons County; *Winchester, J. George M. Register* and *Cochrane & Corliss*, for appellant.
Stevens & Allen, for respondents.

PER CURIAM. The controlling questions in this case were involved and decided in the case of *Emmons Co. v. Thompson* (decided this term) 9 N. D. 598, 84 N. W. Rep. 385. The order appealed from is in all things reversed, and the District Court is directed to enter an order reversing the same, and also to enter an order denying the application made herein to vacate said judgment and tax sale, with costs of both courts to appellant.

(84 N. W. Rep. 1117.)

EMMONS COUNTY *vs.* HARRY GAUGER.

Opinion filed November 13, 1900.

Appeal from District Court, Emmons County; *Winchester, J. George M. Register* and *Cochrane & Corliss*, for appellant.

H. A. Armstrong, Stevens & Allen, and *F. H. Register*, for respondents.

PER CURIAM. The controlling questions in this case were involved and decided in the case of *Emmons Co. v. Thompson* (decided this term) 9 N. D. 598, 84 N. W. Rep. 385. The order appealed from is in all things reversed, and the District Court is directed to enter an order reversing the same, and also to enter an order denying the application made herein to vacate said judgment and tax sale, with costs of both courts to appellant.

(84 N. W. Rep. 1117.)

EMMONS COUNTY *vs.* NETTIE M. KELLY.

Opinion filed November 13, 1900.

Appeal from District Court, Emmons County; *Winchester, J. George M. Register* and *Cochrane & Corliss*, for appellant.

H. A. Armstrong, Stevens & Allen, and *F. H. Register*, for respondents.

PER CURIAM. The controlling questions in this case were involved and decided in the case of *Emmons Co. v. Thompson* (decided this term) 9 N. D. 598, 84 N. W. Rep. 385. The order appealed from is in all things reversed, and the District Court is directed to enter an order reversing the same, and also to enter an

order denying the application made herein to vacate said judgment and tax sale, with costs of both courts to appellant.
(84 N. W. Rep. 1117.)

EMMONS COUNTY vs. LILLY.

Opinion filed November 13, 1900.

Appeal from District Court, Emmons County; *Winchester, J.*

George M. Register and *Cochrane & Corliss*, for appellant.

H. A. Armstrong, Stevens & Allen, and *F. H. Register*, for respondents.

PER CURIAM. The controlling questions in this case were involved and decided in the case of *Emmons Co. v. Thompson* (decided this term) 9 N. D. 598, 84 N. W. Rep. 385. The order appealed from is in all things reversed, and the District Court is directed to enter an order reversing the same, and also to enter an order denying the application made herein to vacate said judgment and tax sale, with costs of both courts to appellant.

(84 N. W. Rep. 1117.)

EMMONS COUNTY vs. ALEX. MCKENZIE, et al.

Opinion filed November 13, 1900.

Appeal from District Court, Emmons County; *Winchester, J.*

George M. Register and *Cochrane & Corliss*, for appellant.

H. A. Armstrong and *Stevens & Allen*, for respondents.

PER CURIAM. The controlling questions in this case were involved and decided in the case of *Emmons Co. v. Thompson* (decided this term) 9 N. D. 598, 84 N. W. Rep. 385. The order appealed from is in all things reversed, and the District Court is directed to enter an order reversing the same, and also to enter an order denying the application made herein to vacate said judgment and tax sale, with costs of both courts to appellant.

(84 N. W. Rep. 1117.)

EMMONS COUNTY vs. ALEX. MCKENZIE, et al.

Opinion filed November 13, 1900.

Appeal from District Court, Emmons County; *Winchester, J.*

George M. Register and *Cochrane & Corliss*, for appellant.

H. A. Armstrong and *Stevens & Allen*, for respondents.

PER CURIAM. The controlling questions in this case were involved and decided in the case of *Emmons Co. v. Thompson* (decided this term) 9 N. D. 598, 84 N. W. Rep. 385. The order

appealed from is in all things reversed, and the District Court is directed to enter an order reversing the same, and also to enter an order denying the application made herein to vacate said judgment and tax sale, with costs of both courts to appellant.
(84 N. W. Rep. 1117.)

EMMONS COUNTY *vs.* ALEX. MCKENZIE, *et al.*

Opinion filed November 13, 1900.

Appeal from District Court, Emmons County; *Winchester, J. George M. Register* and *Cochrane & Corliss*, for appellant.
H. A. Armstrong and *Stevens & Allen*, for respondents.

PER CURIAM. The controlling questions in this case were involved and decided in the case of *Emmons Co. v. Thompson* (decided this term) 9 N. D. 598, 84 N. W. Rep. 385. The order appealed from is in all things reversed, and the District Court is directed to enter an order reversing the same, and also to enter an order denying the application made herein to vacate said judgment and tax sale, with costs of both courts to appellant.
(84 N. W. Rep. 1117.)

EMMONS COUNTY *vs.* CALVIN B. McLAIN.

Opinion filed November 13, 1900.

Appeal from District Court, Emmons County; *Winchester, J. George M. Register* and *Cochrane & Corliss*, for appellant.
H. A. Armstrong and *F. H. Register*, for respondents.

PER CURIAM. The controlling questions in this case were involved and decided in the case of *Emmons Co. v. Thompson* (decided this term) 9 N. D. 598, 84 N. W. Rep. 385. The order appealed from is in all things reversed, and the District Court is directed to enter an order reversing the same, and also to enter an order denying the application made herein to vacate said judgment and tax sale, with costs of both courts to appellant.
(84 N. W. Rep. 1117.)

EMMONS COUNTY *vs.* R. B. MELLON.

Opinion filed November 13, 1900.

Appeal from District Court, Emmons County; *Winchester, J. George M. Register* and *Cochrane & Corliss*, for appellant.
H. A. Armstrong and *Stevens & Allen*, for respondents.

PER CURIAM. The controlling questions in this case were in-

volved and decided in the case of *Emmons Co. v. Thompson* (decided this term) 9 N. D. 598, 84 N. W. Rep. 385. The order appealed from is in all things reversed, and the District Court is directed to enter an order reversing the same, and also to enter an order denying the application made herein to vacate said judgment and tax sale, with costs of both courts to appellant.
(84 N. W. Rep. 1117.)

EMMONS COUNTY *vs.* R. B. MELLON.

Opinion filed November 13, 1900.

Appeal from District Court, Emmons County; *Winchester, J. George M. Register* and *Cochrane & Corliss*, for appellant.
H. A. Armstrong and *Stevens & Allen*, for respondents.

PER CURIAM. The controlling questions in this case were involved and decided in the case of *Emmons Co. v. Thompson* (decided this term) 9 N. D. 598, 84 N. W. Rep. 385. The order appealed from is in all things reversed, and the District Court is directed to enter an order reversing the same, and also to enter an order denying the application made herein to vacate said judgment and tax sale, with costs of both courts to appellant.
(84 N. W. Rep. 1117.)

EMMONS COUNTY *vs.* R. B. MELLON.

Opinion filed November 13, 1900.

Appeal from District Court, Emmons County; *Winchester, J. George M. Register* and *Cochrane & Corliss*, for appellant.
H. A. Armstrong and *Stevens & Allen*, for respondents.

PER CURIAM. The controlling questions in this case were involved and decided in the case of *Emmons Co. v. Thompson* (decided this term) 9 N. D. 598, 84 N. W. Rep. 385. The order appealed from is in all things reversed, and the District Court is directed to enter an order reversing the same, and also to enter an order denying the application made herein to vacate said judgment and tax sale, with costs of both courts to appellant.
(84 N. W. Rep. 1117.)

EMMONS COUNTY *vs.* FRED ROBINSON.

Opinion filed November 13, 1900.

Appeal from District Court, Emmons County; *Winchester, J. George M. Register* and *Cochrane & Corliss*, for appellant.
F. H. Register and *H. A. Armstrong*, for respondents.

PER CURIAM. The controlling questions in this case were involved and decided in the case of *Emmons Co. v. Thompson* (decided this term) 9 N. D. 598, 84 N. W. Rep. 385. The order appealed from is in all things reversed, and the District Court is directed to enter an order reversing the same, and also to enter an order denying the application made herein to vacate said judgment and tax sale, with costs of both courts to appellant.

(84 N. W. Rep. 1117.)

EMMONS COUNTY *vs.* RICHARD THISTLEWAITE.

Opinion filed November 13, 1900.

Appeal from District Court, Emmons County; *Winchester, J.*

George M. Register and *Cochrane & Corliss*, for appellant.

H. A. Armstrong, Stevens & Allen, and *F. H. Register*, for respondent.

PER CURIAM. The controlling questions in this case were involved and decided in the case of *Emmons Co. v. Thompson* (decided this term) 9 N. D. 598, 84 N. W. Rep. 385. The order appealed from is in all things reversed, and the District Court is directed to enter an order reversing the same, and also to enter an order denying the application made herein to vacate said judgment and tax sale, with costs of both courts to appellant.

(84 N. W. Rep. 1117.)

EMMONS COUNTY *vs.* RICHARD THISTLEWAITE.

Opinion filed November 13, 1900.

Appeal from District Court, Emmons County; *Winchester, J.*

George M. Register and *Cochrane & Corliss*, for appellant.

H. A. Armstrong, Stevens & Allen, and *F. H. Register*, for respondent.

PER CURIAM. The controlling questions in this case were involved and decided in the case of *Emmons Co. v. Thompson* (decided this term) 9 N. D. 598, 84 N. W. Rep. 385. The order appealed from is in all things reversed, and the District Court is directed to enter an order reversing the same, and also to enter an order denying the application made herein to vacate said judgment and tax sale, with costs of both courts to appellant.

(84 N. W. Rep. 1117.)

EMMONS COUNTY vs. THOS. A. WILSON.

Opinion filed November 13, 1900.

Appeal from District Court, Emmons County; *Winchester, J.**George M. Register* and *Cochrane & Corliss*, for appellant.*H. A. Armstrong, Stevens & Allen*, and *F. H. Register*, for respondent.

PER CURIAM. The controlling questions in this case were involved and decided in the case of *Emmons Co. v. Thompson* (decided this term) 9 N. D. 598, 84 N. W. Rep. 385. The order appealed from is in all things reversed, and the District Court is directed to enter an order reversing the same, and also to enter an order denying the application made herein to vacate said judgment and tax sale, with costs of both courts to appellant.

(84 N. W. Rep. 1117.)

FLORA B. DOUGLAS vs. GEORGE P. GLAZIER.

Opinion filed December 8, 1900.

Appeal—Review—Questions of Fact.

This court is without jurisdiction to retry issues of fact in cases tried below under the provisions of section 5630, Rev. Codes, unless the statement of the case declares that the appellant desires some specified issues of fact retried, or that he desires a review of the entire case, and such specification contained in the notice of appeal is ineffectual to confer upon this court jurisdiction to retry issues of fact.

Appeal from District Court, Cass County; *Pollock, J.*

Action by Flora B. Douglas against George P. Glazier. Judgment for plaintiff. Defendant appeals.

Affirmed.

J. E. Robinson, for appellant.

The state tax levy was void because the board of equalization had no power to levy the same; such a levy is the exercise of legislative power which may not be delegated. *Willis v. Austin*, 53 Cal. 178; *Harper v. Rowe*, 54 Cal. 235; *Houghton v. Austin*, 46 Cal. 648; § § 174 and 175 Const. The state levy was made under section 1216, Rev. Codes, which provides that the state board of equalization shall decide upon the rate of the state tax to be levied for the current year,—a clear delegation of legislative power. The sales for the year 1896 were not authorized by law; they were made under the revenue law of 1897, which contemplates sales only for taxes levied under that law. Chap. 126, § 74, Laws 1897. Section

77 gives the form of all certificates to be issued on the sale of lands for taxes. The form recites that the land was sold for delinquent taxes. A certificate of sale to be valid, must show on its face that the land was sold for delinquent taxes. *Sheehy v. Hinds*, 27 Minn. 259, 6 N. W. Rep. 781; *Sherbourne v. Ritte*, 35 Minn. 540, 29 N. W. Rep. 322; *Gilfillan v. Chatterton*, 38 Minn. 335, 35 N. W. Rep. 583. The sale was void because not made under the direction of the board of county commissioners and because the notice of sale was not published in a newspaper designated by the county commissioners. *Cass Co. v. Security Improvement Co.*, 7 N. D. 528; *Russell v. Gilson*, 36 Minn. 366, 31 N. W. Rep. 692.

W. J. Clapp and Morrill & Egerud, for respondent.

Section 174 of the Const. directs that the legislative assembly shall provide for raising revenue sufficient to defray the expense of the state for each year. By the enactment of § 1216, Rev. Codes, the legislature provided for the raising of revenue. The California constitution expressly provides that no power to levy taxes can be delegated. Const. of Cal., Article 2, § 12; Black, Tax Titles (2d Ed.) § 26. This is not true in North Dakota. These tax sales were made under chapter 126, Laws of 1897. Sections 73, 74, 75 and 76 of this chapter authorized such sales. The fact that the act, chapter 126, repeals the previous law for the sale for delinquent taxes shows that the legislature intended said section to apply to preceding taxes. *Gull River Lumber Co. v. Lee*, 7 N. D. 138; *State v. Moorehouse*, 5 N. D. 406.

BARTHOLOMEW, C. J. This is a statutory action to determine adverse claims to real property. The plaintiff claims as the owner of the fee, and the defendant claims under tax sales made in 1897 for the taxes of 1896. The trial court held the taxes and the tax sale valid, and the plaintiff appeals.

We find the record on appeal in this case practically identical in all its essential features with the record in *Security Imp. Co. v. Cass Co.*, 9 N. D. 553, 84 N. W. Rep. 477. We have the pleadings, a statement of the case embodying all the evidence offered at the trial, and it is all in the form of a stipulation of counsel, the findings of fact made by the trial court, its conclusions of law, and the judgment. In the statement of the case appellant specifies no issue of fact that he wishes this court to retry, nor does he ask a retrial of the whole case. We are therefore bound by the express terms of section 5630, Rev. Codes, to hold that every fact found by the trial court was correctly found. We are without jurisdiction to retry any issue of fact. See *Security Improvement Co. v. Cass Co.*, 9 N. D. 553, 84 N. W. Rep. 477, and the authorities there collected. Nor is there any claim made in this case that the conclusions of law and judgment are not warranted by the findings of fact. We have nothing to review. True, in his notice of appeal appellant asks this court to retry the issues of fact as to the legality of the taxes for 1896 and the

sale thereunder. This court has twice heretofore ruled that such statement in the notice of appeal is entirely ineffectual. *Ricks v. Bergsvendsen*, 8 N. D. 578, 80 N. W. Rep. 768; *Hayes v. Taylor*, 9 N. D. 92, 81 N. W. Rep. 49. That the statement of the case must specify the particular issues of fact that appellant desires this court to retry, or that he desires a retrial of the entire case when such is the fact, has been iterated by this court until it has become monotonous. The matter is jurisdictional. Counsel cannot waive, it, nor can this court. If cases are to be tried anew upon the facts in this court, it can only be done by compliance with the statute that gives this court, sitting as an appellate court, that unusual power. The judgment of the District Court is affirmed. All concur.

PETITION FOR REHEARING.

Counsel makes a vigorous protest by way of a petition for rehearing against the manner in which the court has construed the abstract in this case. But, from a careful reconsideration of the abstract, we are of opinion that counsel's criticisms are misplaced. The abstract recites that "the statement of the case, as settled and allowed, shows affirmatively that it contains all the evidence which was offered or submitted on the trial of the case." It then proceeds to set out the entire testimony. This course was consistent only with a purpose to obtain a retrial on the facts. But, as the statement of the case as printed did not indicate for what purpose the appeal was taken, we went to the record, and there found, as stated in the opinion, that in his notice of appeal appellant expressly demanded a retrial of certain issues of fact. While this demand, under the statute, was nugatory by reason of its place in the record, yet it served to indicate what was in the appellant's mind, and for what purpose the appeal was taken, and the purpose so indicated was entirely consistent with the manner in which the statement had been prepared. The court decided the case on the line thus indicated by the statement, and was entirely warranted in so doing. Now, however, counsel urges that he never desired a retrial of any fact issue, but only the review of certain law questions. Since, concededly, the facts are properly found, the errors, if any, must necessarily consist in making some improper or unwarranted deductions from such findings of fact. But we cannot consider these questions because none of the findings of fact are presented in the abstract. True, there is in the abstract an assignment of errors in the following words: "The court erred in sustaining the sales for the taxes for the year 1896, for reasons as follows: (1) The state levy was void. It was an exercise of legislative authority, and the state board of equalization had no authority to levy the tax. (2) The sales were made before the tax became delinquent, a year prior to the sales for the year 1895, and they were not made under the direction of the board of county commissioners. (3) The county commissioners did not designate a newspaper for the publication of delinquent tax list; there was no newspaper called the 'Fargo

Argus.' (4) The sales for the tax of 1896 were not authorized by law." But we do not know that these things are in any manner in the case. We cannot officially look at the testimony, and there are no findings before us. True, in connection with his petition for rehearing, appellant presents a copy of the findings. But the record on appeal cannot now be made for the first time, and such findings must be disregarded. In answer to the contention that no findings of fact could have rendered a sale for the taxes of 1896 legal, it is sufficient to say that the practice in this respect must be uniform. If we hold that the conclusions are not supported by the facts found, without having the facts before us, in one case, we must do so in every case, when so required. No such practice is possible. While it is always a matter of regret to this court that it must ignore the merits of an appeal, yet that regret is much tempered in this case by the fact, that first develops in this petition for rehearing, that this is entirely a "friendly" case, and that no costs are to be taxed against either party in any event. Petition denied.

(84 N. W. Rep. 552.)

J. W. STEWART *v.*s. GREGORY, CARTER & COMPANY.

Opinion filed December 6, 1900.

Harmless Error—Secondary Evidence.

Where a witness was improperly permitted to state the contents of a written instrument, the error is cured by the immediate introduction of the instrument, which corresponds in all respects with the statements of the witness.

Real Party in Interest—Undisclosed Principal.

A party contracting in his own name with a third party, but for an undisclosed principal, may himself maintain an action upon such contract.

Unindorsed Bill of Lading.

Possession of an unindorsed bill of lading by a person other than the consignor or consignee raises no presumption that such person is the agent of the consignor.

Appeal from District Court, Cass County; *Pollock, J.*

Action by J. W. Stewart against Gregory, Carter & Co. Judgment for plaintiff. Defendant appeals.

Affirmed.

S. G. More and *Tilly & McLeod*, for appellant.

Miller & Miller, for respondent.

BARTHOLOMEW, C. J. Plaintiff is a farmer, residing near Buffalo, in Cass county. The defendant is a corporation doing a grain commission business in the city of Duluth. On October 6, 1898,

plaintiff loaded a certain car with wheat at said town of Buffalo, and billed the same to defendant at Duluth. This action is brought to recover the value of such car of wheat. The answer admits the formal parts of the complaint; admits the shipment of the wheat, and that the wheat so shipped was the property of the plaintiff; admits the receipt of the wheat by defendant, and its sale on plaintiff's account; and admits the value and the net proceeds as claimed. The sixth paragraph of the answer reads as follows: "Further answering said complaint, defendant says that upon the order of said plaintiff, and with his full knowledge and consent, it has fully paid for said wheat; that on or about the 7th day of October, 1898, the Bank of Buffalo, Buffalo, N. D., made a draft on defendant for the entire proceeds of said wheat, less said charges of \$69.56 by direction and with the authority of said plaintiff, and that defendant accepted said draft, and paid the same in full." The sole issue, under the pleadings, was the question of payment. The jury found that issue in plaintiff's favor, and, a new trial being denied, defendant appeals, and assigns errors upon the rulings of the court in the admission of testimony, and also claims that the verdict is unsupported by the testimony in various enumerated particulars. It is undisputed that when the car of wheat was loaded the bill of lading was taken in plaintiff's name, and it was at once left at the Bank of Buffalo with the cashier, Mr. Batchelor. This was about 8 o'clock in the evening of said October 6th. On the day following, S. G. More, the managing officer of said bank, drew a draft upon defendant for the estimated value of the car of wheat, and signed plaintiff's name to the same by S. G. More, and attached the bill of lading thereto, and forwarded the same to defendant. The draft was promptly paid by defendant, and the proceeds remitted to S. G. More or the Bank of Buffalo. The defendant bases its allegation of payment upon two grounds: First, that S. G. More was authorized by the plaintiff, under the circumstances, to draw said draft and receive the proceeds; and, second, if not so authorized, yet the said proceeds were devoted to plaintiff's use and benefit, with his knowledge, and the act of Mr. More was thereby ratified.

This wheat was grown upon a certain quarter section of land which plaintiff held by contract of purchase from the Maryland Land Company. The purchase was on the crop-payment plan, and plaintiff was bound to deliver the one-third of the crop to said vendor. On the preceding spring the plaintiff had given the Bank of Buffalo a chattel mortgage upon two-thirds of the crop to be grown upon said tract of land. Mr. More testified that this mortgage was given to secure an existing indebtedness, while plaintiff testified it was also to secure future advances. The mortgage was not introduced. Prior to said October 6th the plaintiff had loaded two cars with wheat, grown upon said tract of land in said year, and had taken the bills of lading in the name of said bank, and delivered them to the bank. To exclude any appearance of actual

authority upon the part of Mr. More to draw the draft upon defendant for the wheat in controversy, plaintiff sought to show the terms of this contract of purchase of the land, and that Mr. More had full knowledge thereof, and hence must have known that the third car of wheat was not covered by the mortgage. Plaintiff was asked certain questions as to the terms of this contract. Objections thereto were improperly overruled, but they were immediately followed by the introduction of the contract, and there is no pretense that plaintiff misstated any of its terms; hence the error was harmless. Defendant, in its cross-examination of plaintiff, sought to show that plaintiff was acting in bad faith in shipping the third of the wheat that should belong to his vendor of the land in his own name. The court excluded the testimony, and properly. The pleadings admit that this wheat belonged to plaintiff, but whether it did or not could not affect More's authority to draw the draft, or plaintiff's right to recover, because, if he was shipping in his own name for an undisclosed principal, he still has the right to recover in his own name. 1 Am. & Eng. Enc. Law. (2d Ed.) 1164, and cases cited. Defendant sought to show by one of its own witnesses that it was the custom of the Bank of Buffalo to draw drafts for customers upon bills of lading left at the bank. This was properly excluded. There was no showing or offer to show that plaintiff knew of any such custom, and even if we concede, which plaintiff directly denies, that the bank had so drawn for plaintiff in a prior year, that would not show his knowledge of any such custom. We have noticed all the assignments of error relative to the elucidation of testimony that have any appearance of merit.

The assignment to the effect that the verdict is without support in the testimony must also be overruled. Upon the testimony the jury were warranted in finding that the bill of lading was left at the bank late in the evening for plaintiff's convenience; that no authority was given to the bank or to Mr. More to draw upon defendant in plaintiff's name; that the bank well knew at that time that it had received all the wheat covered by the mortgage; that neither the bank nor Mr. More had ever before drawn against a bill of lading taken in plaintiff's name, and plaintiff had no knowledge of any custom so to do. These facts, if found, would negative any actual authority on the part of S. G. More to make the draft in question. Nor is there any evidence whatever that warranted the defendant in assuming that S. G. More had authority to sign plaintiff's name to the draft. If any transfer of title to the wheat could be assumed from the delivery of the bill of lading, such assumption was overcome by the fact that the draft was drawn in plaintiff's name, which was in itself an assertion that the wheat belonged to plaintiff. The question must hinge upon More's real or ostensible authority to sign plaintiff's name to the draft. As we have seen, there was no actual authority, and, so far as this record shows, plaintiff and defendant had never had any correspondence, directly or indirectly, so that it is not possible that plaintiff could

have induced defendant to believe that More was his agent. If the defendant had, in other instances, honored drafts drawn by Mr. More for the customers at his bank, it was doubtless done, as in this case, in reliance upon the responsibility of Mr. More or the Bank of Buffalo. The jury might honestly have reached the conclusion that there was no authority, real or ostensible, in Mr. More to draw the draft.

There remains the question of ratification. The bill of lading was left at the bank late in the evening of October 6th. About 4 o'clock in the afternoon of the 7th of October the draft was mailed to Duluth. On October 8th plaintiff called at the bank, and a partial settlement was had. Plaintiff had purchased supplies from a certain firm in Buffalo, and More was responsible for the bill,—“morally responsible,” he says, but under the evidence the jury might well have found a legal responsibility. The two cars of wheat that had been shipped in the name of the bank had been shipped some time before his partial settlement was made. At that time More requested plaintiff to get the bill for the supplies, and when the bill was produced More gave plaintiff a draft to pay for the same, which was accordingly done. This draft exceeded in amount the draft drawn against the car of wheat. More testifies, in effect, that plaintiff knew at that time that he (More) had drawn upon defendant, and that the proceeds of such draft went to pay the bill for supplies. Plaintiff, on the other hand, testifies that he had no knowledge whatever that More had drawn on defendant until, in answer to a letter which he caused to be sent to defendant asking for returns on said car of wheat, defendant wrote him, on October 20th, stating that it had remitted to Mr. More on a draft signed with plaintiff's name by S. G. More. If the jury believed plaintiff, there could have been no ratification of the act of Mr. More, because there was no knowledge thereof. The verdict has support in the evidence, and the judgment is affirmed. All concur. (84 N. W. Rep. 553.)

ELIZA FIELDS vs. MARTHA MOTT.

Opinion filed December 5, 1900.

Mortgage—Construction—Rents Secured.

A mortgage which expressly recites that it is given to secure the prompt payment of rent according to the terms of a certain written lease, and names the amount secured, which amount corresponds with the amount agreed in the lease to be paid as rent, does not secure rents which become due after the expiration of such lease under a tenancy arising by implication of law from holding over after such lease expired.

Appeal from District Court, Cass County; *Pollock, J.*

Action by Eliza Fields against Martha Mott. Judgment for defendant. Plaintiff appeals.

Affirmed.

Turner & Lee, for appellant.

S. G. Roberts, for respondent.

YOUNG, J. Action in claim and delivery to recover possession of certain chattel property by virtue of a mortgage thereon. The defense is that the debt secured by the mortgage was fully paid long prior to the commencement of the action. The trial court directed a verdict for the defendant, and judgment was duly entered thereon. Plaintiff appeals. But a single question is involved. Did the court err in directing a verdict for defendant? We are agreed that it did not. The answer to the question rests entirely upon the construction to be given to the mortgage as to the amount it secures. It appears that on October 12, 1896, the defendant leased rooms from plaintiff. The lease was in writing, and was for a period of one year, the exact term named in the instrument, commenced October 20, 1896, and ended October 19, 1897. The lessee, the defendant herein, covenanted therein to pay as rental therefor a monthly rent of \$50 per month on the 1st day of each month, in advance. The lease also contained a provision granting the lessee "the privilege of keeping said rooms one year after October 19, 1897, upon the same terms and conditions." As a part of the same transaction, and for the purpose of securing the rent so agreed to be paid, defendant executed and delivered the chattel mortgage which is the basis of this action. It is in the ordinary form. It recites that it is given "for the purpose of securing the payment of six hundred dollars." It also contains this further recital: "This mortgage is given to secure the prompt payment of the rent by me of said rooms according to the terms of a written lease dated October 12, 1896; provided, if the undersigned (the defendant herein) shall pay the rent according to the terms of said lease, then the mortgage shall be void,—with the additional provision that, on the happening of certain defaults, "the whole sum secured hereby shall become due and payable." It appears that defendant occupied said rooms continuously from October 19, 1896, up to April 10, 1899, when she was evicted for nonpayment of rent. It appears, also, that she paid all rent due up to February 20, 1899. The sum now due and unpaid is for rent accruing after said last-named date. The question is, does the mortgage secure this indebtedness?

No theory of construction will permit of any other than a negative answer. Turning to the mortgage, we find that it expresses, in unambiguous language, the exact sum it was given to secure, namely \$600. The reference in the mortgage to the lease does not modify its meaning in any particular, and is plainly only for the purpose of showing the time when the sum secured became due, namely, \$50 at the beginning of each month in advance. It is admitted that the above sum, being the one year's rent, has been fully paid. It is also admitted that for the second year, in which defendant elected to occupy the rooms under the privilege contained in the lease, payment has been made in full. The rent now due did not arise under

the written lease at all. That lease had expired. It is true that where a lessee of real property remains in possession thereof after the expiration of the hiring, and the lessor accepts rent from him, the parties are presumed to have renewed the hiring on the same terms and for the same time, not exceeding one year. Rev. Codes, § 4084. See, also, *Blumenberg v. Myres*, 91 Am. Dec. 560, and cases cited in note; also 12 Am. & Eng. Enc. L. 758. Nevertheless, in such case, the tenancy is a new tenancy, and is one merely implied by law, in the absence of an express agreement by the parties upon the same or other and new terms and conditions. It is a tenancy not provided for in the lease, and it clearly was not intended that the mortgage was to secure rents due under a tenancy which is entirely independent of the lease, and not even in contemplation when it was executed. The debt secured by the mortgage having been paid, the court properly directed a verdict for the defendant. Judgment affirmed. All concur.

(84 N. W. Rep. 555.)

THOMAS MILLER, JR. vs. TOWNSHIP OF OAKWOOD.

Opinion filed December 4, 1900.

Highways—Vacating.

A recently established highway should not be vacated unless new facts have arisen since its establishment rendering it unnecessary or undesirable.

Appeal from Supervisors—Review.

Where, upon an appeal to the District Court from an order of the township board of supervisors vacating a highway, the undisputed testimony showed that such highway had very recently been established, and that the order of establishment had, upon appeal therefrom, been confirmed by the judgment of the District Court based upon the verdict of a jury, and that surrounding conditions had in no manner changed since the establishment of said highway in a manner to affect its utility, and that such highway, if undisturbed, would be used by the public, *held*, that the party appealing from said vacating order was entitled to a directed verdict in his favor.

Appeal from District Court, Walsh County; *Sauter, J.*

Action by Thomas Miller, Jr., against the Township of Oakwood. Judgment for plaintiff. Defendant appeals. Affirmed.

Feetham & Skulason, for appellant.

The fact that Mr. Dobie had, for a period of years, permitted a trail to be traveled across his farm, had no bearing upon the question of the public usefulness and necessity of the road. *Opp v. Timmons*, 149 Ind. 239, 48 N. E. Rep. 1028. The repeated questioning of witnesses over objection, by which questions material facts in issue were assumed, constituted prejudicial error. 1 Thomp. Trials, 369. The court should have charged the jury in the language of

defendant's request, viz: "When it is shown that section lines have been traveled for a great length of time, and public work has been done thereon, or grades erected, the presumption is that highways do exist upon such section lines, and you have a right in ascertaining whether or not roads are public highways to take into consideration these facts. Elliott, Roads & Streets, 125, 126; §§ 1052, 1053, Rev. Codes.

Gray & Casey, for respondent.

The objection that a question assumes a fact not in evidence is untenable, where, as in this case, the fact assumed had been already shown in evidence. *Brandt v. Frederick*, 47 N. W. Rep. 10. Appellant's objections to evidence were general and not sufficiently specific to advise the court and counsel as to the exact grounds upon which he relied. 8 Enc. Pl. & Pr. 218; *Kolka v. Jones*, 6 N. D. 461; *Mitchell v. Davies*, 53 N. W. Rep. 363; *Bright v. Ecker*, 69 N. W. Rep. 824; *Mining Co. v. Noonan*, 14 N. W. Rep. 426; *First Nat. Bank v. Laughlin*, 4 N. D. 391, 61 N. W. Rep. 473. By limiting their objection to the admission of evidence to a particular ground, other grounds of evidence were waived. *Smith v. Bean*, 48 N. W. Rep. 687; *Triggs v. Jones*, 48 N. W. Rep. 1113; *State v. Lechman*, 49 N. W. Rep. 3; *Tooley v. Bacon*, 70 N. Y. 34; *People v. McCaulay*, 45 Cal. 148. The refusal of appellant's request to charge the jury was not error, because the matter of the request was fully covered in another portion of the charge. Before a section line can become a confirmed highway something beyond the declaration of said section is essential to the establishment of a highway upon the section line. *Keen v. Board*, 67 N. W. Rep. 623.

BARTHOLOMEW, C. J. On the 26th day of July, 1898, the board of supervisors of the township of Oakwood, in Walsh county, made an order discontinuing a public highway theretofore regularly established and running east and west across section 4 in said township on the quarter section line. From such order the respondent herein appealed to the District Court of said county, as by statute provided. Section 1060, Rev. Codes. The trial of the issues of fact to a jury in the District Court resulted in a judgment setting aside and reversing the order of the township supervisors. From the judgment of the District Court, entered after motion for new trial had been denied, the township appeals.

The assignments of error are numerous. We think none of them are well taken, but we can discuss them only generally. The legality or propriety of the order of the township board must be adjudicated upon the conditions and statutes then existing. This was an order vacating and discontinuing a public highway. Upon an appeal from that order the burden rested upon the township to establish the validity and propriety of the order. No charitable presumptions are thrown over it, as over the determinations of courts of general jurisdiction. Manifestly, somewhat different principles must be ap-

plied where a township seeks to vacate a duly established and existing highway from those that would govern the township in resisting the establishment of a highway in the first instance. A township may defeat the establishment of a highway by showing that the cost thereof will exceed the benefit that the public will derive therefrom. *City of Detroit v. Beecher* (Mich.) 42 N. W. Rep. 986, 4 L. R. A. 813. But, a highway having been once legally established, the public cannot be benefitted by its vacation unless the cost of its maintenance exceed the benefit that the public may derive from its continuance. The law does not contemplate that any highway will be established until it has been determined by some tribunal, authorized by law to act in the matter, that the benefits to the public arising from its establishment will exceed the cost of opening and maintaining the highway. The fact of establishment raises the presumption that such is the case. True it is that local conditions may change to such an extent by the establishment of other highways in the immediate neighborhood, or change in the lines or methods of travel, that this determination cannot have the perpetual force of an adjudication. But, where the highway has been but recently established, this presumption becomes very strong, and in some jurisdictions conclusive. *Webb v. Town of Rocky Hill*, 21 Conn. 468. And in 15 Am. & Eng. Enc. L. (2d Ed.) 397, it is said: "A road recently established will generally not be vacated unless new facts have arisen since its establishment rendering it unnecessary or undesirable." At the trial of this case, in order to establish legal grounds for vacating the said road, the appellant introduced but one witness,—one Dobie. The testimony of this witness showed that for some years prior to 1896 the public had used a track or road along the line where the township now seeks to vacate the highway, and that a bridge had been put in on said line, and public road work done thereon, the witness testifying that up to that time he, with others, used the road frequently. It would seem, however, that the road had never been legally established, and in 1896 witness constructed a fence across it. Witness resides on the east line of said section 4, and a road had been established, running south on said line, by which witness and those residing east of him could reach their county seat and market town. But, after witness had thus closed said road, and in 1897, such proceedings were had that the board of supervisors legally established a highway, a portion of which was located along the east and west quarter line across said section 4. From the order establishing such highway across said section the witness appealed to the District Court, and the case was duly tried in that court to a jury, and the order of the board establishing the highway was confirmed. The appeal was taken August 2, 1897, and final judgment of confirmation entered August 19, 1898. We have here a case where the board of supervisors first determined that the road was a public benefit, and upon appeal from that deter-

mination a jury of 12 men, under instructions from the court, reached the same conclusion. So far as such a question can become *res judicata*, it should be so held in this case, and certainly that determination cannot be disturbed unless changed conditions destroy its force. But no effort whatever was made to destroy its force. Not the slightest change in conditions from the time said road was established until the trial of this case was shown. The most of the testimony of the witness was devoted to an effort to show that respondent, Miller, would not be shut off from a public highway if this road were vacated, and that by traveling an extra mile every trip he made to his market town, postoffice, polling place, or school house he could reach a highway over his own land. True, the witness claimed that the people living east and northeast of his place could reach the county seat and market town by another equally feasible route. But such route was opened and in use when the supervisors and the former jury found that the road in controversy was a public benefit. No claim was made that the highway would not, to some extent, be used by the public. On the contrary, the witness testified: "I suppose, if it (the highway) is not discontinued, that several persons would travel there, because it is on the quarter line, and people might want to travel it. Supposing people were going past, it would save a half mile extra travel." When appellant rested, the respondent moved the court for a directed verdict in his favor for the reason that no ground recognized by law for the vacation of the highway had been shown. This motion was denied, whereupon respondent introduced testimony upon the status of other highways in the vicinity and the public necessity for this particular highway, and this was followed by rebutting testimony. We mention this only to state that nothing in this testimony supplied the defect in appellant's case in chief. There was nothing to show any change in conditions after the establishment of the highway, or to show that the highway had for any reason become unnecessary or undesirable. The testimony did show, however, that the witness Dobie was the party who is urging the vacation of this highway. Having failed in his effort to prevent the location of the highway, he is now seeking in another form to relitigate the same identical questions. The language of the court in *People v. Griswold*, 67 N. Y. 62, is directly applicable to the conditions here existing. In speaking of the highway statute, the court said: "Manifestly it looks to stability in the determination of highway commissioners in the laying out of roads, and does not permit vacillation and capricious or willful change therein annually. Again, the old road may be discontinued when it becomes useless and unnecessary. This language implies a road for a time open to the public for its use, but, by change of circumstances, and of local needs and habits of trade and intercourse, losing usefulness. It does not mean a uselessness existing at the laying out of it. That has been passed upon by a jury, and the use for it found. The same question is not to be at once submitted to another jury. Ordinarily, the road must

be opened, and time must elapse to prove its use or the contrary. We cannot but regard the action of the appellant and the applicants to him as an attempt to reverse the determination of the former commissioner, rather than as a movement in good faith to discontinue an old road on account of it having become useless and unnecessary. That action was not based upon a change from the circumstances in which the road was laid out, but upon the very same facts as then existed they asked and obtained from another jury a different certificate thereupon. We do not think that this is what the statute contemplated."

At the close of the testimony the respondent herein renewed his motion for a directed verdict. It was again denied, and the case submitted to the jury with full instructions. The jury returned a verdict in favor of the respondent. Appellant now attacks the charge of the court and the rulings upon the admission of testimony. What we have already said shows that the respondent was entitled as matter of law to a directed verdict in his favor upon the undisputed facts. That being the case, if the court below made any errors—which we do not decide—they were necessarily without prejudice to any legal right of appellant. The judgment of the District Court is in all things affirmed. All concur.

(84 N. W. Rep. 556.)

ALBERT BIDGOOD v.s. MONARCH ELEVATOR COMPANY.

Opinion filed November 21, 1900.

Mortgage of Crop to be Grown in the Future.

A mortgage of personal property not then owned by the mortgagor will not attach to such property as a lien thereon until the mortgagor acquires some title or interest therein.

Mortgage of Tenant Attaches on Division of the Grain.

A mortgage was executed by a tenant upon a portion of a crop that he expected thereafter to raise under a lease which declared that the entire title and right of possession of said crop should remain in the landlord, and the tenant could acquire no right, title or interest until the crop was divided by the landlord, and the portion to which the tenant was entitled under the lease delivered to him. The specific grain raised was never divided, but was delivered to an elevator for general storage, and subsequently the parties agreed upon their respective shares, and general storage checks were delivered by the elevator to each party for the number of bushels to which he was entitled. *Held*, that the tenant never acquired any interest in the specific grain raised to which the mortgage lien could attach.

Appeal from District Court, Richland County; *Lauder, J.*

Action by Albert Bidgood against the Monarch Elevator Company. Judgment for plaintiff. The Monarch Elevator Company appeals. Reversed.

W. E. Purcell, for appellant.

It was error to permit the mortgagor to testify over objection that the chattel mortgage was signed by him in the presence of the witnesses mentioned on the mortgage. *Keith v. Haggart*, 2 N. D. 18; *Donovan v. Elev. Co.*, 8 N. D. 585. The evidence disclosed that the grain was put in general storage without any division, and with the knowledge and consent of plaintiff a storage ticket issued therefor. It was therefore error to permit the mortgagor to testify to a division of the grain. *George v. Triplett*, 5 N. D. 50. Under the contract in evidence the title to all the grain raised upon the land described in the chattel mortgage was in the land owner and not in the mortgagor. *Angell v. Egger*, 6 N. D. 391; *Whithed v. Elev. Co.*, 9 N. D. 224, 83 N. W. Rep. 238; *Plano Mfg. Co. v. Jones*, 8 N. D. 315; *Best v. Muir*, 8 N. D. 44. Plaintiff waived his mortgage lien by placing the wheat in defendant's elevator in general storage, —he himself caused it to be mixed with the general mass of grain. *Sanford v. Elev. Co.*, 2 N. D. 6; *Best Brewing Co. v. Pillsbury*, 5 Dak. 62; *Nor. Dak. Elev. Co. v. Clark*, 3 N. D. 26. Conversion of mortgaged property by the mortgagee extinguishes the lien. *Everett v. Buchanan*, 2 Dak. 240. The defense of waiver raised a question of fact for the jury. *Warnken v. Chisholm*, 8 N. D. 243; *Peterson v. Elev. Co.*, 9 N. D. 55, 81 N. W. Rep. 59.

Freerks & Freerks, for respondent.

The description of the property mortgaged was sufficient. *Coughran v. Sundback*, 70 N. W. Rep. 644; *Advance Thresher Co. v. Schmidt*, 70 N. W. Rep. 646; *Union Nat. Bank v. Oium*, 3 N. D. 193, 54 N. W. Rep. 1034; *Strolberg v. Brandenburg*, 39 Minn. 348; *Wells v. Wilcox*, 68 Ia. 708; *Wheeler v. Becker*, 68 Ia. 723; *Knapp, Stout & Co. v. Deitz*, 24 N. W. Rep. 471; *Schaffer v. Pickrell*, 22 Kan. 431. It was not necessary to prove that the chattel mortgage was signed in the presence of two witnesses. An instrument or contract made by statute may be proved in the same manner as one having no subscribing witnesses whatever. § 3888a, Rev. Codes. The record does not show anything from which a waiver of the plaintiff of his mortgage lien can be inferred, nor does it show that the plaintiff ever intended to do so.

BARTHOLOMEW, C. J. This is a contest wherein the plaintiff, claiming as mortgagee, seeks to recover from the defendant damages for the conversion of certain wheat. A trial to a jury resulted in a directed verdict for plaintiff. A new trial was denied, and defendant appeals from the judgment.

Among the numerous errors assigned we shall notice but one, and that relates to the ruling of the court in directing a verdict for plaintiff. This ruling must be reversed, because we are clear that under the evidence, as it now stands, it does not appear that plaintiff's mortgage ever attached. The mortgage was given to plaintiff by one A. C. Weldon to secure a promissory note, both note and

mortgage bearing date April 7, 1899. The mortgage purported to cover "one-half of crop sown and grown on the W. $\frac{1}{2}$ of N. E. $\frac{1}{4}$ of Sec. 17, T. 132, R. 48, for the year 1899." The mortgagor, Weldon, was in possession of said land by virtue of a contract of lease theretofore entered into with the owner of said land. This contract was introduced into evidence. It is long, and specific in its provisions. Its substance is, in effect, that the tenant, the party of the second part, shall raise the crop entirely at his own expense, and shall perform certain covenants in the lease contained. In case of failure to perform, the first party may perform and retain sufficient of the crop to reimburse himself, but ultimately the first party (the landlord) is to deliver so much of the crop to second party as will, with amounts retained for expenses incurred, give the second party (the tenant) the benefit of two-thirds of the crop grown; and the lease declares that "until such delivery the absolute title of all the grain raised upon said premises shall be and remain in the party of the first part, and the said party of the second part acquires no right, title, or interest therein." The tenant raised a crop upon the land in the year 1899. This court has held that under such a contract the title and right of possession of the crop were in the landlord, and remained in him until divided as provided in the lease, and that, if the tenant took possession of the crop, or any part thereof, before such division, the landlord could maintain replevin therefor. *Angell v. Egger*, 6 N. D. 391, 71 N. W. Rep. 547; *Whithed v. Elev. Co.*, 9 N. D. 224, 83 N. W. Rep. 238. When the crop in question in this case was threshed, it was hauled, without division, to the elevator of the defendant, and placed in general storage. At that time the landlord had full title to and control of the entire crop. He was present when it was so delivered, and the tenant was also present, and the mortgagee, who was in the employ of the tenant, was also present, and hauled and delivered a portion of the crop; and all these parties knew the grain was being delivered for general storage. After the wheat was all so delivered, the landlord and tenant agreed upon their respective shares thereof, and the agent in charge of the elevator was requested to issue a storage check to each party for the number of bushels to which he was entitled. This was done. These tickets were general storage tickets. They did not entitle the holder to a return of the identical wheat delivered, but only to an equal number of bushels of the same quality and grade of wheat. The wheat represented by the ticket delivered to the tenant was subsequently sold, and the mortgagee received no part of the proceeds. He now seeks to recover from the elevator company as for conversion of the wheat upon which the mortgage was given. He claims that the defendant had constructive notice of his mortgage by reason of the fact that it was on record in the proper office, and also that he gave the elevator agent actual notice thereof before the first load of said wheat was delivered. The sufficiency of these notices is questioned, but, in our view, the question is entirely

immaterial. If plaintiff in fact had no mortgage, or, rather, if the lien of his paper mortgage had not attached when the grain was delivered, then defendant might receive it regardless of any claim of mortgage lien made by plaintiff. Section 4680, Rev. Codes, reads as follows: "An agreement may be made to create a lien upon property not yet acquired by the party agreeing to give the lien, or not yet in existence. In such case the lien agreed for attaches from the time when the party agreeing to give it acquires an interest in the thing to the extent of such interest." By the express terms of the lease under which this crop was raised the tenant (the mortgagor) could "acquire no right, title, or interest therein" until a division was made. Hence plaintiff had no lien when the grain was delivered to the defendant. If any lien under the mortgage ever attached, it could attach only to the one-half of the specific wheat grown upon the land described in the mortgage. It could not attach to other wheat which the mortgagor might be entitled to demand of the defendant upon his storage ticket. The lien of a mortgage cannot thus shift from one piece of property to another. See *Best v. Muir*, 8 N. D. 44-48, 77 N. W. Rep. 95. So far as plaintiff is concerned, his rights are not different from what they would be had the mortgage upon the one-half of the crop grown upon the land specified been executed and delivered to him after the grain had been delivered to the defendant, and indistinguishably mixed with other wheat, and storage tickets issued therefor to the mortgagor. In that case the mortgage lien could not attach to the specific wheat for two reasons: First, it could not be identified or separated; and, second, the mortgagor at that time had no interest in that specific grain. He had only the right to demand of defendant a certain number of bushels of wheat of a certain kind and grade. The mortgage could not attach to that right. We are clear that on the evidence as it now stands it is not shown that the mortgage ever attached. The judgment of the District Court is reversed, and a new trial ordered. Reversed. All concur.

(84 N. W. Rep. 561.)

NOTE.

Actions for trover and conversion in North and South Dakota have grown largely from the purchase and sale of annual crops subject to chattel mortgage, seed lien, or thresher's lien.

WHO MAY MAINTAIN TROVER.

The mortgagee of a growing crop can maintain trover for its conversion after the crop is harvested, threshed and hauled to market, if his mortgage is duly filed. *Nichols v. Barnes*, 3 Dak. 148; *Underwood v. Elev. Co.*, 6 N. D. 274; *Gull River Lumber Co. v. Elev. Co.*, 6 N. D. 276; *Hostetter v. Brooks Elev. Co.*, 4 N. D. 357; *Grand Forks Nat. Bank v. Elev. Co.*, 6 Dak. 367; *Bank v. Mann*, 2 N. D. 456; *Donovan v. Elev. Co.*, 7 N. D. 513. The owner of a threshing rig may mortgage its future earnings and maintain conversion against one who, with actual or constructive notice, appropriates the same.

Sykes v. Hannawalt, 5 N. D. 335. And this, notwithstanding the title to mortgaged chattels, does not pass to the mortgagee until a foreclosure has been completed. Sanford v. Elev. Co., 2 N. D. 6; Everett v. Buchanan, 2 Dak. 249. Trover will lie against one holding the property of another, claiming to do so until a debt due him by the other is paid. Taylor v. Jones, 3 N. D. 235. Where a chattel mortgage described the crops to be grown on certain described lands for and during the years 1888, 1889 and for each and every succeeding year, until the debt secured is fully paid, the description was held sufficient for the mortgagee to maintain trover thereon for the conversion of the crops raised in 1900. Merchants Nat. Bank v. Mann, 2 N. D. 456. By statute contract liens for crops, except for rent or purchase price, are only good on the next succeeding crop. Sec. 4631, Rev. Codes. To maintain trover the chattel mortgagee must see to it that the description of the property is sufficient to impart notice to a purchaser when the same is filed. A description of the land in a chattel mortgage as N. E. 4, S. 6, T. 102, R. 48, is sufficient. Coughran v. Sundback, 9 S. D. 483; Advance Thresher Co. v. Schmidt, 9 S. D. 489. Although such a description in an assessment roll is insufficient. Power v. Bowdle, 3 N. D. 107; Powers v. Larabee, 2 N. D. 141. Where property was described as situated in a certain township and range, without mentioning the county or state within which such section and property were located, but the mortgage was filed in the proper county, the description was held sufficient as against an attaching creditor. Union Nat. Bank v. Oium, 3 N. D. 193. For further cases upon the insufficiency of description of property in chattel mortgages, see Russell & Co. v. Amundson, 4 N. D. 118; Wilson v. Rustad, 7 N. D. 330. The question of sufficiency of description in a chattel mortgage is one of law for the court. Wilson v. Rustad, 7 N. D. 330. A mortgage to secure future advances is good. Union Nat. Bank v. Moline M. & S. Co., 7 N. D. 201. Where property was described in a chattel mortgage, which it was not the intention of the parties should appear therein, and under such circumstances as to show fraud or mistake, held that he mortgagee could not recover in conversion. Plano Mfg. Co. v. Daley, 6 N. D. 330. A mortgagee may sue in conversion before the maturity of his debt secured by mortgage, where the mortgagor has sold the crop subject to the mortgage lien. Ellestad v. Elev. Co., 6 N. D. 88. The holder of an inferior lien does not give notice to the holder of a prior mortgage by the filing of his lien. He must bring home knowledge to the owner of the first mortgage if he would defeat the right of the holder of the first mortgage to claim priority as to advances made after the later lien has attached. Union Nat. Bank v. Moline M. & S. Co., 7 N. D. 201. The holder of a first mortgage may, by negligence, lose his priority of lien as against a subsequent lienholder. Union Nat. Bank v. Moline M. & S. Co., 7 N. D. 201. And by authorizing the mortgagor to sell mortgaged property the mortgagee waives his lien and cannot thereafter sue a purchaser of such property for its conversion. Peterson v. Elev. Co., 9 N. D. 55; New England Mortg. Security Co. v. Elev. Co., 6 N. D. 407; Seymour v. Cargill Elev. Co., 6 N. D. 444; Scheinber v. Elev. Co., 9 N. D. 113. A chattel mortgage does not confer title or transfer an absolute right of possession upon the mortgagee upon condition broken, and trover cannot be maintained until default, and until demand for possession by the mortgagee. Jones v. Wilson, 8 N. D. 186. A second mortgagee may maintain an action against the first mortgagee for conversion of personal property covered by both mortgages. Clendenning v. Hawk, 8 N. D. 419. But a mortgagee of grain cannot recover in conversion against the holder of warehouse receipts, issued for the grain covered by chattel mortgage, when the grain has been delivered into a warehouse and mixed with other grain of the same grade and the warehouse receipts call for a like amount, kind and grade of grain with that deposited. Plano Mfg. Co. v. Jones, 8 N. D. 315; Towne v. Elev. Co., 8 N. D. 200; Omlie v. Farmers State Bank, 8 N. D. 570; Best v. Muir, 8 N. D. 44; Best v. Barrett, 8 N. D. 49. A tenant's contract stipulated

the title, ownership and possession of crops to be in the landlord until division. The tenant's mortgage, thereafter given on crops to be grown upon this leased land, did not give sufficient property to the mortgagee to entitle it to maintain conversion before division between the landlord and tenant. *Savings Bank v. Canfield*, 12 S. D. 330. One not the owner of property or entitled to its possession at the time of suit brought cannot recover for its possession. *Omlie v. Farmers State Bank*, 8 N. D. 570. Personal property owned by its vendor, in Manitoba, under conditional sale notes reserving title, was brought into this state without the knowledge or consent of the vendor, held, that conversion was maintainable by the owner of the notes, and that the question of waiver was for the jury. *Warnken v. Langdon Merc. Co.*, 8 N. D. 243. A chattel mortgage without witnesses is good between the parties and as against purchasers of the mortgaged property with notice of it. Hence, the mortgagee can maintain conversion against one removing or destroying the property with knowledge of the mortgage. *Fisher v. Porter*, 11 S. D. 311. The holder of a seed lien had, before the enactment of Sec. 4845, Rev. Codes, no right to take possession of the property covered by the lien, even after default, and could not maintain an action for conversion on refusal by the holder of the property to deliver the same on demand. *Black v. Elev. Co.*, 7 N. D. 129; *Welter v. Jacobson*, 7 N. D. 32. So, where mortgaged chattels were wrongfully seized under execution, the right to recover for the conversion was unaffected by the fact that the mortgagor had other property covered by the mortgage sufficient to pay the debt. *Coughran v. Sundback*, 9 S. D. 483. The mortgagee in a mortgage given and filed in another state may follow the property into this state and recover against the purchaser of it without first filing his mortgage here. *Wilson v. Rustad*, 7 N. D. 330. A tenant in common may maintain the action against his co-tenant. *Wood v. Steinau*, 9 S. D. 110.

WHAT AMOUNTS TO CONVERSION.

A sale of property by an agent to himself, followed by a claim of ownership, is a conversion of the property. *Anderson v. Bank*, 5 N. D. 80, 451. The owner of the property so long as he can identify it may follow it as against a wrong-doer. But when the property is converted into money and loaned to a third person it cannot be followed or the third person held for conversion. *Seybold v. Bank*, 5 N. D. 460. The action will lie against one claiming to hold property until a debt owing him by the owner is paid. *Taylor v. Jones*, 3 N. D. 235. Mingling mortgaged grain in an elevator with other grain of the same kind is of itself a conversion. *Best Brewing Co. v. Pillsbury*, 5 Dak. 62; *North Dakota Elev. Co. v. Clark*, 3 N. D. 26; *Wagoner v. Olson*, 3 N. D. 69. Not so, however, where the mingling is with the consent of the mortgagor. *Bigwood v. Elev. Co.*, 84 N. W. Rep. 561; *New England M. S. Co. v. Elev. Co.*, 6 N. D. 407. The sale of property covered by mortgage at private sale, in satisfaction of claim secured thereby, is a conversion of the property and extinguishes the lien of the mortgage. *Lovejoy v. Bank*, 5 N. D. 623; *Everett v. Buchanan*, 2 Dak. 249.

PLEADING.

For form of complaint held sufficient in action of conversion, see *Humpfner v. Osborne & Co.*, 2 S. D. 310, 314; *First Nat. Bank v. North*, 2 S. D. 480; *Holdridge v. Lee*, 3 S. D. 134; *Lloyd v. Powers*, 4 Dak. 62; *Donovan v. Elev. Co.*, 7 N. D. 513. For complaint in conversion by sheriff against his deputy. *Lynn v. Jackson*, 5 N. D. 46. For conversion of crop by mortgagee against purchaser from mortgagor. *Perry v. Beaupre*, 6 Dak. 49; *Best Brewing Co. v. Elev. Co.*, 5 Dak. 46; *Donovan v. Elev. Co.*, 7 N. D. 513. In determining the sufficiency of the complaint the averments therein can alone be considered. A complaint which does not state a cause of action by its averments, without reference to its exhibits, is bad upon

demurrer. *Aultman & Co. v. Siglinger*, 2 S. D. 446; *Lumber Co. v. Fitch*, 3 S. D. 217; *Wright v. Sherman*, 3 S. D. 290; *Donovan v. Elevator Co.*, 7 N. D. 513. This rule has been changed in South Dakota, later cases overruling the earlier, and it is now held in that state that exhibits will be considered in determining the sufficiency of the complaint. *First Nat. Bank v. Ins. Co.*, 6 S. D. 424; *Cranmer v. Kohn*, 11 S. D. 245. Pleadings are construed most strongly against the pleader. *Nation v. Cameron*, 2 Dak. 347. A chattel mortgagee suing in conversion must allege a default in payment of the note secured, or a breach of some condition of his mortgage, else no right of possession is shown. *Madison Nat. Bank v. Farmer*, 5 Dak. 285. A mortgagee of an unplanted crop must aver and prove that the mortgagor planted and grew the crops, or that they were produced by agencies set in motion by the mortgagor. *Donovan v. Elev. Co.*, 7 N. D. 513. It is not necessary to aver that defendant had notice, either actual or constructive, of the mortgage. *Donovan v. Elev. Co.*, 7 N. D. 513. If plaintiff desires to claim the highest market value between conversion and verdict he must ask for it in his complaint. *Thompson v. Schaetzel*, 6 Dak. 284; *Rosum v. Hodges*, 1 S. D. 308. Where plaintiff's claim is based upon a thresher's lien, he must aver facts disclosing a full compliance with the statute, through which alone a lien can be acquired. *Parker v. Bank*, 3 N. D. 88. An averment that plaintiff did the business of running and operating a threshing machine is insufficient. Such averment is not equivalent to an allegation that plaintiff owned and operated a threshing machine. *Parker v. Bank*, 3 N. D. 89. The complaint should aver that the statement for lien contained a description of the land on which the grain was grown. *Parker v. Bank*, 3 N. D. 89; *Lavin v. Bradley*, 1 N. D. 291. Where the right of recovery is predicated on a seed lien, the complaint must allege that the seed was sown on land owned, used, occupied or rented by the purchaser of the seed. *Joslyn v. McMahon*, 2 N. D. 53. And that a description of the land was contained in the account in writing, filed. *Lavin v. Bradley*, 1 N. D. 241. An allegation in a complaint for conversion, based upon a thresher's lien, that "for the purpose of securing his pay for said threshing, and for the purpose of perfecting a lien on the grain so threshed, he caused to be made an itemized statement of his account for such threshing, containing his bill therefor, and for making oath there to," etc., is sufficient. *Parker v. Bank*, 3 N. D. 88. Plaintiff must allege and prove that he owned and operated the machine with which the threshing was done, and the lien statement as filed must contain a correct description of the land whereon the grain, upon which the lien is claimed, was grown. *Parker v. Bank*, 3 N. D. 87; *Martin v. Hawthorne*, 3 N. D. 412; *Anderson v. Alseth*, 6 S. D. 571. A lien statement cannot be amended. *Lavin v. Bradley*, 1 N. D. 291. The statute giving threshers' liens gives no right of possession until the right of foreclosure is complete. A complaint based upon a thresher's lien must allege that the credit extended to the party, for whom the threshing was done, has expired, or that the account is due. *Parker v. Bank*, 3 N. D. 90. An answer that defendant has not sufficient knowledge or information to form a belief as to the matters averred in the complaint is sufficient to put plaintiff on proof. *Kelly v. Beaupre*, 6 Dak. 49; *Sanford v. Elev. Co.*, 2 N. D. 6; *Van Dyke v. Doherty*, 6 N. D. 263; *Northwestern Cordage Co. v. Galbraith*, 9 S. D. 634; *Russell & Co. v. Amundson*, 4 N. D. 112; *Cumins v. Lawrence Co.*, 1 S. D. 158, 2 S. D. 452. A denial upon information and belief that a chattel mortgage, thresher's lien, or seed lien is on file in the office of the register of deeds, will not be sufficient. With means of positive information open before him, a party is not permitted to say that he has no knowledge or information sufficient to form a belief. *Van Dyke v. Doherty*, 6 N. D. 263; *Russell & Co. v. Amundson*, 4 N. D. 117. For necessary averments in a complaint against a sheriff for conversion of debtor's exemptions, see *Holdridge v. Lee*, 3 S. D. 134.

EVIDENCE.

A chattel mortgagee or licensee suing must show the identity of the property described in the mortgage, or lien statement, with that which came

to defendant's possession and which defendant is charged with having converted. *Russell & Co. v. Amundson*, 4 N. D. 112; *Martin v. Hawthorne*, 5 N. D. 66. He must prove default in payment of the note secured or a breach of some condition of his mortgage. *Madison Nat. Bank v. Farmer*, 5 Dak. 285. If the action is by the owner of a seed lien, or thresher's lien, plaintiff must show that the grain was grown or threshed, in fact, upon the land described in the statement on file. *Martin v. Hawthorne*, 3 N. D. 403. And when he claims for threshing must prove that he owned and operated the machine with which the threshing was done, and that the lien statement filed correctly describes the land on which the grain was grown. *Parker v. Bank*, 3 N. D. 87; *Anderson v. Alseth*, 6 S. D. 571; *Martin v. Hawthorne*, 3 N. D. 412. He must also prove that the credit extended to the party for which the threshing was done has expired; that the account is due. *Parker v. Bank*, 3 N. D. 90. Where the evidence disclosed a sale of the wheat to an elevator company, the issuance of wheat tickets for it, and subsequently the purchase of the tickets by the elevator company, but where there was no evidence that the wheat was mixed with other wheat or shipped out or sold, in an action by the mortgagee it was held that no conversion was proven in the absence of demand and refusal before suit. *Sanford v. Elev. Co.*, 2 N. D. 6; *James v. Wilson*, 8 N. D. 186; *Towne v. Elev. Co.*, 8 N. D. 200. Otherwise, if evidence disclosed that wheat was mixed in elevator or shipped out of the state without the mortgagee's consent. *Best Brewing Co. v. Elev. Co.*, 5 Dak. 62. Or that demand would be perfunctory and fruitless. *Consolidated L. & I. Co. v. Hawley*, 7 S. D. 229; *Myrick v. Bill*, 3 Dak. 284; *Citizens Bank v. Elev. Co.*, 82 N. W. Rep. 186; *Gjemzey v. Tuthill*, 82 N. W. Rep. 190. If plaintiff alleges ownership, or defendant claims title in himself, no proof of demand is necessary; or, if the uncontradicted evidence shows a conversion. *Sanford v. Elev. Co.*, 2 N. D. 6; *Rosum v. Hodges*, 3 S. D. 308. Plaintiff claiming under chattel mortgage must prove that his mortgage was executed by the mortgagor in the presence of the two witnesses who signed the same as witnesses thereto. *Lander v. Proper*, 6 Dak. 64; *Keith v. Haggart*, 2 N. D. 21; *Wood v. Lee*, 4 S. D. 495. The burden of proof is on the defendant in conversion to show circumstances in mitigation of damages. *Stone v. Ry. Co.*, 8 S. D. 1; *Holt v. Van Eps*, 1 Dak. 198. Defendant may show that plaintiff has not been damaged by the act of conversion, or that his damages were merely nominal. *Stone v. Ry. Co.*, 3 S. D. 330. Thus in suit for conversion of a certificate of deposit defendant was permitted to show insolvency of the bank issuing the certificate in reduction of damages. *Holt v. Van Eps*, 1 Dak. 198; *First Nat. Bank v. Dickson*, 5 Dak. 286. The lien claimant must prove notice of his claim, either actual or constructive, was brought home to the defendant. *Sykes v. Hannawalt*, 5 N. D. 335. That he was in possession or entitled to the immediate possession of the property at the time of the conversion. *Parker v. Bank*, 3 N. D. 87; *Sandager v. Elev. Co.*, 2 N. D. 3. Also a general or special ownership in the property. *Clendenning v. Hawk*, 8 N. D. 419. Also the value of the property converted. *Keith v. Haggart*, 2 N. D. 218; *Sanford v. Elev. Co.*, 2 N. D. 6. It is not proper evidence of value for a witness to testify from memoranda in a day book kept by an employe, whose duty it was to register the market values from day to day, but where the witness neither made the memoranda nor had personal knowledge of the values. *Keith v. Haggart*, 2 N. D. 18. A purchaser of mortgaged chattels has a right to assume that in selling the mortgagor is not committing a felony; the title will pass to the purchaser subject to the mortgage lien. *Sanford v. Elev. Co.*, 2 N. D. 6. Contents of stubs of grain tickets, made by an elevator agent at the time the grain was received, may be proven where the original entries were destroyed. *Kelly v. Elev. Co.*, 7 N. D. 343. The lienholder must show loss of his lien or impairment of his security. *Union Nat. Bank v. Moline M. & S. Co.*, 7 N. D. 201. A chattel mortgage witnessed by the mortgagor as one of two witnesses is not entitled to be filed, and the filing thereof is not constructive notice of its contents. *Donovan v. Elev. Co.*, 8 N. D. 585.

Contra, *Fisher v. Porter*, 11 S. D. 311. Value of the property at the date of conversion must be shown. *Towne v. Elev. Co.*, 8 N. D. 200. Mere evidence of shipment of the property out of the state, is not sufficient evidence of conversion against an innocent bailee. *Towne v. Elev. Co.*, 8 N. D. 200. Refusal by a warehouseman to return grain stored on demand is prima facie evidence of conversion of the grain. *Marshall v. Andrews & Gage*, 8 N. D. 364. The law presumes, in the absence of evidence to the contrary, that a chattel mortgage was delivered on the day of its date. *Schweinber v. Elev. Co.*, 9 N. D. 113. Parol evidence is admissible to show that an instrument in form a lease was intended as a mortgage only, and a conversion of the crops by one having notice of a prior lien thereon, and buying with notice thereof. *Meyer v. Elev. Co.*, 12 S. Dak. 172. Evidence that the mortgagor of personal property sold a portion of the property mortgaged, with the knowledge and consent of the mortgagee, and applied the proceeds to his own use, does not per se render the mortgage void as to creditors. *First Nat. Bank v. Calkins*, 12 S. D. 411. The amount appearing to be due upon a note is presumed to be its value in the absence of evidence to the contrary. *Wiley v. Grigsby* 11 S. D. 491. No demand for payment of a note secured by chattel mortgage is necessary before bringing suit for conversion of chattels described in the mortgage. *Acme Harvester Co. v. Butterfield*, 12 S. D. 91. An inferior lienholder suing a first mortgagee for conversion must prove actual knowledge by the first mortgagee of the existence of the inferior lienholder's claim to defeat the right of the first mortgagee to claim priority as to advances made after the later lien has attached. *Union Nat. Bank v. Moline M. & S. Co.*, 7 N. D. 201. A chattel mortgagee suing a purchaser of mortgaged chattels for conversion, must prove the execution and filing of the chattel mortgage, the sale and conversion of the property mortgaged, the value of the property, and a demand and refusal to return. *Underwood v. Atlantic Elev. Co.*, 6 N. D. 274; *Seymour v. Elev. Co.*, 6 N. D. 444. A demand upon the agent in charge of an elevator wherein the grain, the subject of controversy, was stored at the time of demand, is sufficient. *Seymour v. Elev. Co.*, 6 N. D. 444. Declarations of an elevator agent as to why he refused to pay for wheat received by him into the elevator are competent as part of the res gestae. *Benjamin v. Elev. Co.*, 6 N. D. 254. The holder of a mortgage may introduce parol evidence to help out a defective description of the property mortgaged and to identify the property as that covered by his lien. *Union Nat. Bank v. Oium*, 3 N. D. 193; *Russell & Co. v. Amundson*, 4 N. D. 113. When the description of the property in a mortgage is good as between the parties no one can question its sufficiency but one claiming the protection of the statute requiring chattel mortgages to be filed. *Wilson v. Rustad*, 7 N. D. 330. The subscribing witnesses to a chattel mortgage should be called to prove its execution when the fact of its execution is denied by the answer. *Brynjolson v. Elev. Co.*, 6 N. D. 450. But see statutory modification of this rule. Sec. 3888a, Rev. Codes, 1899. A chattel mortgage is valid between the parties to it and as against purchasers with actual notice, even if unwitnessed, and will sustain an action for conversion against one removing or destroying the property mortgaged with notice of the mortgage. *Fisher v. Porter*, 11 S. D. 311. Property is presumed to be in the county where the mortgage is filed. *Felker v. Grant*, 10 S. D. 141. The burden is on one claiming under an unfiled chattel mortgage, to show that the purchaser took with notice. *LaCrosse, etc., Co. v. Anderson*, 9 S. D. 560. Allowing mortgaged property to be taken to another state, where it was again mortgaged, held a waiver of the prior lien. *Carroll v. Nesbit*, 9 S. D. 497. Declarations of an agent, made subsequent to the transaction when mortgaged wheat was received by him into the elevator, are not competent as against his principal. *Benjamin v. Elev. Co.*, 6 N. D. 254. Evidence must clearly establish a conversion by the defendant, else a verdict can not be sustained against him by the mortgagee. *McArthur v. Dryden*, 6 N. D. 438; *Gull River Lumber Co. v. Osborne McMillan Elev. Co.*, 6 N. D. 276.

DAMAGES.

A delay of eleven months is not such reasonable diligence as will entitle plaintiff to recover the highest market value between conversion and verdict. *Pickert v. Rugg*, 1 N. D. 230; *First Nat. Bank v. Elev. Co.*, 8 N. D. 439. The reasonable diligence required in a suit relates both to the commencement of the action and the subsequent prosecution of it. *First Nat. Bank v. Red River Valley Nat. Bank*, 9 N. D. 319. Whether action was brought and prosecuted with diligence, is a question of law. *First Nat. Bank v. Red River Valley Nat. Bank*, 9 N. D. 319. Where the action for conversion was begun on the day of conversion, but not tried for two years after the suit was begun, and where there was nothing in the record to show that plaintiff was responsible for the delay, a verdict for the highest market price of grain between the date of conversion and the verdict was sustained, notwithstanding an extraordinary boom because of an attempted corner of the market intervened. *First Nat. Bank v. Red River Valley Nat. Bank*, 9 N. D. 319. Plaintiff suing for the conversion of property subject to his lien can recover against the holder of the legal title the value of his lien only. *Union Nat. Bank v. Moline M. & S. Co.*, 7 N. D. 219. And a second mortgagee can recover against the first mortgagee the value of the property converted less the amount due on the first mortgage. *DeLuce v. Root*, 12 S. D. 141; *Clendenning v. Hawk*, 8 N. D. 419. Damages awarded are given on the theory of compensation. *Lovejoy v. Bank*, 5 N. D. 623; *Meyer v. Elev. Co.*, 12 S. D. 172. Conversion takes place at the time of demand and refusal to deliver mortgaged property to the person lawfully entitled thereto; hence, the damage recoverable is the value of the property at the time of the demand. *Towne v. Elev. Co.*, 8 N. D. 200. Where property is taken from a mortgagee in possession on process against the mortgagor, the mortgagee may recover expenses, in addition to the amount of the debt and interest, from the wrong-doer. *Lander v. Propper*, 6 Dak. 64. The usual measure of damage is the value of the property with interest from the date of conversion. *Thompson v. Schaetzel*, 6 Dak. 284; *Rosum v. Hodges*, 1 S. D. 308; *Holt v. Van Eps*, 1 Dak. 198; *Jandt v. South*, 2 Dak. 86. Where a party, whose property has been wrongfully taken by an officer and sold at judicial sale, bought in the property at such sale, his measure of damage in conversion was the sum it cost him to regain possession with interest from the time of payment, and damages for detention. *Northrup v. Cross*, 2 N. D. 439. Choses in action are presumed to be worth the amount of principal and interest indicated on the face of the instrument at the time of the conversion, with legal interest thence to the trial. *Holt v. Van Eps*, 1 Dak. 189. It is competent for the defendant to show that plaintiff has not been damaged by the conversion, or that his damages were merely nominal. *Stone v. Ry. Co.*, 3 S. D. 330; *Holt v. Van Eps*, 1 Dak. 198; *First Nat. Bank v. Dickson*, 5 Dak. 286. It is no defense to an action for conversion of seed grain that the licensee took other security for his debt, unless the security taken or credit extended is such as to evidence an intent to waive the lien and rely exclusively on the security given. *Joslyn v. Schmidt*, 2 N. D. 53. In conversion, the judgment is for damages and not in the alternative, as in claim and delivery. *Northrup v. Cross*, 2 N. D. 433.

INDEX.

ABORTION.

1. Abortion and miscarriage are not interchangeable terms within the meaning of the criminal code of this state. Miscarriage, as used in § 7177, Rev. Codes, when construed with reference to § 7086, Rev. Codes, means the bringing forth of the foetus before it is capable of living. *State v. Belyea*, 360.

ABSTRACTS ON APPEAL. See APPEAL AND ERROR.

1. The appellant's abstract stated, in general terms, that defendant appealed from the judgment of the District Court to this court, and contained a copy of such judgment, but omitted to state, as required by rule 13 of the amended rules of this court, that such appeal was taken by serving and filing a notice of appeal and supersedeas bond. A motion to dismiss the appeal on the ground that the abstract failed to show on its face that an appeal to this court had been perfected was made in this court, and was denied. The abstract was faulty, for the reasons stated, but, in questions affecting the jurisdiction of this court, we shall, when necessary, explore the record proper. In this case no claim is made that the appeal itself was irregular. *Erickson v. Bank*, 82.

ACCOUNTING. See EXECUTORS AND ADMINISTRATORS, 104, 437, 449.

1. In an action to compel an accounting on the part of a trustee where the trusteeship extended over a period of nine years, both parties were uneducated Scandinavians, and no regular books of account were kept. Upon a review of the entire evidence in the case plaintiff was awarded judgment in the sum of \$251.00. *Julin v. Bowman*, 87.
2. A party who has been appointed as administrator of an estate and received letters of administration thereon, and has seized and misappropriated and dissipated the property of the estate, cannot evade an accounting upon the ground of the nullity of his appointment. *Dobler v. Strobel*, 104.
3. Where an ancillary executor or administrator reports to the court making his ancillary appointment, and accounts for all the property in the ancillary jurisdiction to such court, it is not necessary that he also account to the court of domiciliary jurisdiction. *Joy v. Elton*, 428.

ACTION TO QUIET TITLE. See QUIETING TITLE, 306, 538.

1. Under Rev. Codes, § 5904, authorizing actions by persons having an interest in real property against others who claim an estate or interest therein, an action may be maintained by a plaintiff having an interest in the property, whether legal or equitable; the rule in chancery which requires a plaintiff in such actions to show both possession and legal title in himself being abrogated. *Dalrymple v. Security Loan & Trust Co.*, 306.

ACTION TO QUIET TITLE—Continued.

2. Where, under the direction of a purchaser paying the consideration, real estate is conveyed by the vendor to a stranger, who is named as grantee in a deed absolute on its face, which grantee nevertheless receives the trust for the sole use and benefit of parties not named in the deed, such parties are the beneficiaries under the deed, and as such are seized of the entire title; such parties are in a position to maintain an action to quiet the title to such real estate. *Dalrymple v. Security Loan & Trust Co.*, 306.

ADJOURNMENTS. See CONTINUANCE, 175.

ADMINISTRATORS. See EXECUTORS AND ADMINISTRATORS, 428, 104, 268.

ADULTERY. See DIVORCE, 192.

AGENCY. See PRINCIPAL AND AGENT, 19, 285, 516; INSURANCE, 19.

ALIAS SUMMONS. See JUSTICE OF THE PEACE, 204.

ALIENS. See VOTERS, 278; NATURALIZATION, 278.

1. Where a party is shown to be an alien, such alienage is presumed to continue until some evidence to the contrary is produced, but proof that such party voted in this country overcomes the presumption of alienage, and raises a presumption of naturalization, as the law will not presume that the party committed an unlawful act. *Kadlec v. Pavik*, 278.
2. Where a foreign-born person had been in this country for ten years, and had resided in one county in this state for seven years, proof that he had taken out no naturalization papers in that county is no evidence that he was not a legal voter. *Kadlec v. Pavik*, 278.
3. Declarations of a party that he had voted, but had no citizen's papers, when confined to no time, place, or election, are not admissible in evidence to show that such party was not a qualified voter at a specified time and election. *Kadlec v. Pavik*, 278.

ALTERATION OF INSTRUMENTS. See CONTRACTS, 285; PRINCIPAL AND AGENT, 285.

1. A deed executed by plaintiff purported to convey three tracts of land to decedent, her husband. The tract first described was written out at length in words, with numbers in brackets added. The description of the second and third parcels was not written out at length, but was described as follows: "Also the E. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$." Plaintiff testified positively that the deed when executed conveyed only the first tract. A witness testified that subsequent to the execution of the deed decedent requested plaintiff to deed back the homestead, one of the two land tracts. A third witness testified that decedent attempted to induce plaintiff to deed back the homestead, stating that he did not know whether the deed was all right or not. A brother and sister of decedent, present at the execution of the deed, testified that the three tracts were included, and the justice taking the acknowledgment corroborated their testimony to some extent. *Held*, in a suit to cancel the deed for alteration, that the evidence was not sufficient to overcome the deed. *Riley v. Riley*, 580.

ALTERATION OF INSTRUMENTS—Continued.

2. In an action to annul a deed on the ground of material alteration after its execution, the burden to show such alteration rests on the plaintiff, and in such case the plaintiff must make out his case by evidence which is clear, strong and convincing. *Riley v. Riley*, 580.
3. In an action upon a bond with a large number of sureties, it appeared on the face of the instrument that one name that had been signed as surety had subsequently been erased, and other names appeared below the erased signature. The bond was primarily admissible in evidence, the legal presumption was that the erasure was innocent and not fraudulent in fact or in law, and the burden rested upon the other signers to show that their implied contract of contribution had been altered by the erasure. *Cass Co. v. American Exch. Bank*, 263.
4. A contract for the sale of land was executed by the owner and left with his agent for the sale of such land, for delivery to the purchaser, the agent altered the instrument by substituting the name of another person and changing both the consideration and the rate of interest, and delivered the same to such other person. *Held*, that the contract so delivered was not the contract of the owner. *Ballou v. Bergvendsen*, 285.

AMENDMENTS. See STATEMENT OF THE CASE, 535; TRIALS, 19.

1. The Supreme Court will not amend a statement of the case, but, on proper showing, will remand the record to the District Court to be there amended by the judge before whom the case was tried. *Montgomery v. Harker*, 535.
2. Where an amendment of the complaint at the trial is allowed on condition that defendant be given sufficient time to prepare to meet the issues as amended, and thereafter defendant announces himself ready, and proceeds to trial on the amended pleadings, he will not be heard to urge that he was prejudiced by reason of the allowance of such amendment. *McCabe Bros. v. Aetna Ins. Co.*, 19.

ANCILLARY ADMINISTRATION. See EXECUTORS AND ADMINISTRATORS, 428; ACCOUNTING, 449.

APPEAL AND ERROR. See REMAND OF RECORD, 553, 535.

1. No question will be considered upon a petition for rehearing which was not properly assigned for error in counsel's brief, and which was not presented on the argument or decided in the opinion of the court. *Sweigle v. Gates*, 550.
2. Authority to try a case on the evidence *de novo* cannot be conferred upon the Supreme Court by amicable arrangements between counsel, or otherwise than as the law directs. *Security Improvement Co. v. Cass County*, 553.
3. Notice of an appealable order may be served upon appellant's counsel by delivering to him a copy of such order. Such service is sufficient notice of the order to set in motion the statute limiting the time of appeal. *Keogh v. Snow*, 458.
4. Where, after the refusal of a trial court to direct a verdict in his favor, the defendant allows the jury to be discharged and consents to a trial before the court, he will be held to have waived the error, if any, in regard to the ruling on his motion for a verdict. *Erickson v. Bank* 81.

APPEAL AND ERROR—Continued.

5. Where an amendment of the complaint at the trial is allowed on condition that defendant be given sufficient time to prepare to meet the issues as amended, and thereafter defendant announces himself ready and proceeds to trial on the amended pleadings, he will not be heard to urge that he was prejudiced by reason of the allowance of such amendment. *McCabe v. Aetna Ins. Co.*, 19.
6. An objection to the introduction of evidence in a case, on the ground that the complaint does not state sufficient facts to constitute a cause of action, is insufficient in not directing the attention of the trial court to the defect in the complaint upon which the party making the objection relies, and the overruling of an objection couched in that form is not, therefore, available error upon appeal. *Chilson v. Bank*, 96.
7. An objection to the introduction of any evidence, upon the ground that the complaint did not state a cause of action, made at the beginning of the trial, is insufficient, since an attack on the pleading at that stage of the case must be specific. *Schweinber v. Great Western Elev. Co.*, 113.
8. A trial de novo cannot be accorded in the Supreme Court when the record does not contain a statement of the case as provided for in section 5630, Rev. Codes, as amended by chapter 5, Laws 1897, and having embodied therein the specifications required by said section. *National Cash Register Co. v. Wilson*, 112.
9. An appeal from a judgment entered in a case where an issue of fact was tried in the District Court, without a jury, the statement of the case, required by Laws of 1897, chapter 5, which provides that a statement of the case shall be settled, and that the appellant shall specify therein the questions of fact he desires the Supreme Court to review; and further, that if the appellant shall specify in the statement that he desires to review the entire case, all the evidence and proceedings shall be embodied in the statement, embodying specifications of alleged errors of law arising on rulings of the court below, on the admission of testimony, and also a specification, based on the refusal of the trial court to direct a verdict in defendant's favor. The statement further specified particulars in which appellant claimed the respective findings of fact were not justified by the evidence. The statement contained neither of the specifications as required by the statute. *Held*, that by reason of the omissions, the appellate court could not try the whole case or any particular fact de novo, or review errors arising in the admission of evidence. *Erickson v. Bank*, 81.
10. Under Session Laws 1897, chapter 5, which provides that the Supreme Court may try questions of fact, or the entire case de novo, in cases tried in the District Court without a jury, including those where the evidence is taken before a referee and reported to the court, this court is without authority to try either distinct questions of fact, or the entire case de novo, where the statement of the case does not contain either specifications of fact or a request to review the entire case, such a request embraced in the notice of appeal, either to try the case anew or retry certain specified facts, is wholly inoperative and confers no authority upon this court to re-try the case or any fact in the case. *Hayes v. Taylor*, 92.
11. Under Comp. Laws, § 5489, before an order of the court can become a part of the judgment roll, without being made such by a statement of the case, it must be an order involving the merits and necessarily affecting the judgment. *Held*, that an order denying a motion to quash an alternative writ of mandamus forms no part of the judgment roll, unless made so by a statement of the case. *Mooney v. Donovan*, 93.

APPEAL AND ERROR—Continued.

12. Where the statement of the case contains neither a statement that appellant wants any particular issues of fact or the entire case retried, nor specifications of particulars wherein the findings of fact are not supported by the evidence, nor exceptions to such findings, nor to errors of law upon which appellant relies, the merits of the controversy cannot be examined on appeal, either under chapter 5, Laws 1807, requiring the first elements in the statement, or under § 5467, Rev. Codes, requiring the second. *Mooney v. Donovan*, 93.
13. The appellant's abstract stated in general terms that defendant appealed from the judgment of the District Court and contained a copy of such judgment, but omitted to state, as required by rule 13 of the amended rules of the Supreme Court, that such appeal was taken by serving and filing a notice of appeal and supersedeas bond. A motion to dismiss the appeal on the ground that the abstract failed to show on its face that an appeal to the Supreme Court had been perfected, was made. No claim was made that the appeal itself was irregular. *Held*, that the motion should be denied, since in questions affecting jurisdiction the court will, on appeal, if necessary, examine the record proper where the abstract is faulty. *Erickson v. Bank*, 81.
14. In an action to recover money only, a jury was sworn, and after all the evidence had been submitted, and the case was rested on both sides, the defendant asked the court to direct a verdict in his favor. This was denied, and defendant excepted to the ruling. The plaintiff then requested a directed verdict, but the court, without ruling on this request, discharged the jury. The court, later, made findings of fact and law and judgment was entered for plaintiff, from which defendant appeals. No exception was taken to the discharge of the jury, and no error was assigned thereon. *Held*, that counsel, by their silence, waived a jury and consented to a trial by the court, and hence the trial and appeal must be governed by chapter 5, Laws 1807, providing for procedure in cases tried in the District Court without a jury where an issue of fact is joined. *Erickson v. Bank*, 81.
15. In a suit for fraudulent representations inducing the purchase of a note, plaintiff's counsel stated to the jury that plaintiff had rescinded the contract and offered to return the note. The court, however, instructed the jury that there had been no rescission, and further, that the measure of damages was the difference between the actual and the presented value of the note at the time of purchase. *Held*, that the counsel's statement that the contract was rescinded was erroneous, the error was harmless, being cured by the instruction. *Chilson v. Houston*, 498.
16. Where a party sets forth facts by which he claims he has been damaged in a large sum, and goes to trial upon such facts before a jury, he cannot be heard on appeal after verdict and judgment against him to allege that the facts entitled him to equitable relief. *Ravicz v. Nickells*, 536.
17. Where counsel had not demanded a retrial of any fact in issue in the settled statement of the case, as required by § 5630, Rev. Codes, 1890, the Supreme Court was precluded from a retrial of any fact in the case, or from considering the evidence for any purpose, therefore refused to consider and ascertain whether the trial court erred in its findings of fact. *Security Imp. Co. v. Cass Co.*, 553.

APPEAL AND ERROR—Continued.

18. Where counsel does not call attention to any error on the judgment roll proper, the judgment which is presumptively valid will be affirmed. *Security Imp. Co. v. Cass Co.*, 553.
19. In cases tried to the court without a jury, the statement of the case upon appeal must, under § 5630, Rev. Codes, contain a demand for a retrial of the entire case, or of some specified fact therein, else the Supreme Court is without power to retry any issue of fact in the case. Errors in the rulings of the lower court will not be reviewed. *State v. McGruer*, 566.
20. An order bringing in an additional party defendant does not so operate as to prevent a judgment from which an appeal might be taken within section 5626, subd. 1, Rev. Codes, and hence is not appealable under such subdivision. *Bolton v. Donovan*, 575.
21. Under section 5626, subd. 4, Rev. Codes, granting an appeal from an interlocutory order when it involves the merits of the action or some part thereof, an interlocutory order bringing in an additional defendant is appealable. *Bolton v. Donovan*, 575.
22. An order bringing in an additional party defendant does not determine the action within subd. 1, section 5626, Rev. Codes, and hence is not appealable under such subdivision. *Bolton v. Donovan*, 575.
23. Error in permitting a witness to state the contents of a written instrument was harmless where the instrument was immediately introduced and corresponded in all respects to the statements of the witness. *Stewart v. Gregory*, 618.
24. The Supreme Court is without jurisdiction to retry issues of fact in cases tried below under section 5630, Rev. Codes, unless the statement of the case declares that the appellant desires some specified issues of fact retried, or that he desires a review of the entire case, and such specification contained in the notice of appeal is ineffectual to confer upon this court jurisdiction to retry issues of fact. *Douglas v. Glazier*, 615.
25. After entry of judgment appellant served on respondents a proposed statement of the case, to which no proposed amendments were served. About one year after the service of said statement, and after the statutory period for settling the case, the trial court settled and allowed a statement which differed from said proposed statement. Pursuant to notice respondents appeared before the court at the time of the settlement and allowance of the statement, and filed written objections to the settlement of any statement, for the reason that the time allowed had expired, and no cause for an extension had been shown, which objections were supported by affidavit. No attempt was made to show cause by the appellant, and no reason for extending time was stated by the trial court. *Held*, that a motion to strike the statement from the record should be granted, since the fact that no cause for an extension was shown appeared affirmatively, and in such cases no power to extend time exists in the trial court. *McDonald v. Beatty*, 293.
26. Under Rev. Codes, § 5467, providing for the settlement of the statement of a case on appeal, where no proposed amendments are served, a statement may be settled without an extension of the time within 20 days of the expiration of the time allowed by statute for the service of such proposed amendments. *McDonald v. Beatty*, 293.
27. An order confirming sale of real estate made under execution is a final order and appealable. *Dakota Inv. Co. v. Sullivan*, 303.

APPEAL AND ERROR—Continued.

28. A defendant who wishes to avail himself of error in denying a motion for a directed verdict, made at the close of plaintiff's case, where he thereafter introduces testimony, must renew the motion at the close of the case, otherwise the error is waived. *First Nat. Bank v. Red River Valley Nat. Bank*, 319.
29. Defendant attempted by one notice of appeal to take two wholly independent appeals to the Supreme Court. *Held*, that this cannot be done. *Prondzinski v. Garbutt*, 239.
30. A notice of appeal can bring up for review but a single order or judgment. It is improper to unite in the same notice an appeal from two orders, or from two judgments, or from an order and a judgment. *Prondzinski v. Garbutt*, 239.
31. A verbal error of the court in instructing the jury as to a date, where it is apparent that no confusion could result in the minds of the jurors as to the time of the commission of the offence, nor that the defendant could otherwise be prejudiced in his rights, *held*, harmless. *State v. Murphy*, 175.
32. The certificate of a trial judge to a statement of the case properly settled and allowed in a case tried under section 5630, Rev. Codes, as amended by chapter 5 of the Laws of 1897, reciting that such statement "contains all of the evidence introduced," is sufficient to permit a review of the entire case upon appeal, provided it does not appear affirmatively elsewhere in the record that such statement does not contain all of the evidence offered at the trial. *Erickson v. Kelley*, 12.
33. A trial de novo cannot be accorded in the Supreme Court when the record does not contain a statement of the case as provided for in section 5630, Rev. Codes, as amended by chapter 5 of the Laws of 1897, and having embodied therein the specifications required by said section. *National Cash Register Co. v. Wilson*, 112.
34. A specification of particulars in which defendant claims that the findings of fact are without support in the evidence, is superfluous under the Newman law as amended by chapter 5 of the Laws of 1897, and confers no authority upon the Supreme Court to retry the case or any fact in the case anew. Such specifications appertain to jury cases but not to cases tried to the court. *Erickson v. Citizens Nat. Bank*, 81.
35. A statement of the case embodied specifications of errors of law arising upon rulings of the court below upon the admission of testimony and also a specification based upon the refusal of the trial court to direct a verdict in defendant's favor. The statement further embraced specifications of particulars wherein the appellant claimed that the respective findings of fact were not justified by the evidence, but the statement of the case contained no declaration as required by chapter 5, Laws 1897, to the effect that the appellant desired a review of the entire case in the Supreme Court, nor did the statement embrace a specification of any fact or facts which appellant desired the Supreme Court to review. *Held*, that, by reason of said omission, neither a retrial of the case or of any particular fact in the case could be had. *Erickson v. Citizens Nat. Bank*, 81.
36. In cases governed by chapter 5, Laws 1897, objections to evidence and the rulings made by the trial court upon the admission of testimony cannot be considered on appeal under assignments specifying the rulings as error. *Erickson v. Citizens Nat. Bank*, 81.

APPEAL AND ERROR—Continued.

37. In cases tried in the District Court without a jury, including those where the evidence is taken before a referee and reported to the court, the Supreme Court is without authority to retry either distinct questions of fact or the entire case *de novo*, where the statement of the case does not contain either specifications of fact or a request to review the entire case. *Hayes v. Taylor*, 92.
38. A request embraced in the notice of appeal either to try the case anew or retry certain specified facts is wholly inoperative and confers no authority upon the Supreme Court to retry the case or any fact in the case. But in cases tried without a jury under chapter 5, Laws 1897, to give authority to the Supreme Court to retry either distinct questions of fact or the entire case *de novo*, the statement of the case must contain either specifications of fact or a request to review the entire case. *Hayes v. Taylor*, 92.
39. Sections 6771, 6772, 6776, Rev. Codes, relating to appeals from Justice's Courts, construed. *Held*, that the service of a notice of appeal upon the adverse party, and the filing of the same with an undertaking with the clerk of the District Court within thirty days from the rendition of the judgment appealed from, do not alone give the District Court jurisdiction of such appeal. Service of the statutory undertaking is also necessary. *Held*, further, that the District Court, in case of failure to serve such undertaking, is without jurisdiction to grant leave to the appellant to serve and file a new undertaking. *Richardson v. Campbell*, 100.
40. Section 6258, Rev. Codes, providing that executors, administrators, and guardians may appeal from certain decrees and orders without giving an appeal bond, construed; and *held*, that said section applies only to appeals from County to District Courts, and does not exempt them from giving the cost bond required by section 6772, *Id.*, upon all appeals from judgments rendered in Justice Courts. *Richardson v. Campbell*, 100.
41. A trial *de novo* cannot be accorded in the Supreme Court when the record does not contain a statement of the case as provided for in section 5630, Rev. Codes, as amended by chapter 5 of the Laws of 1897, and having embodied therein the specifications required by said section. *National Cash Register Co. v. Wilson*, 112.
42. It was error to deny a motion to strike the case from the trial calendar when it appeared that the issue of law, raised by a demurrer, had been finally disposed of at a prior term of court, and that subsequent to the joinder of issue of fact no note of issue had been filed with the clerk or notice of trial served upon the adverse party, and upon the further ground that no notice of trial was served subsequent to the determination of the appeal by the Supreme Court. *Oswald v. Moran*, 170.
43. Where a motion to strike a case from the trial calendar was seasonably made upon the ground that no notice of trial was served subsequent to the determination of the appeal by the Supreme Court, judgment thereafter was irregularly entered and was vacated on appeal. *Oswald v. Moran*, 170.
44. Where counsel does not call attention to any error on the judgment roll proper, the judgment, which is presumptively valid, will be affirmed. *Security Imp. Co. v. Cass County*, 553.
45. Where counsel had not demanded a retrial of any fact in issue, *held*, that the Supreme Court is precluded from considering the evidence to ascertain whether the trial court erred in its findings of fact. *Security Imp. Co. v. Cass County*, 553.

APPEAL AND ERROR—Continued.

46. Where statement of case contains all the evidence, but does not embrace demand for retrial, the court, under Rev. Codes 1899, § 5630, cannot consider the evidence for any purpose. *Security Imp. Co. v. Cass County*, 553.

APPELLATE PROCEDURE. See APPEAL AND ERROR; JUSTICE OF THE PEACE, 100.

APPEALABLE ORDERS.

1. An order confirming sale of real estate on execution is a final order and appealable. *Dakota Inv. Co. v. Sullivan*, 303.
2. An order bringing in an additional defendant is not appealable under subd. 1, § 5626, Rev. Codes. *Bolton v. Donovan*, 575.
3. Under § 5626, subd. 4, Rev. Codes, granting an appeal from an interlocutory order when it involves the merits of the action or some part thereof, an interlocutory order bringing in an additional defendant is appealable. *Bolton v. Donovan*, 575.
4. Under Rev. Codes, § 5626, specifying what orders are appealable, an order to show cause why respondent should not be punished for contempt for violation of a decree against defendant containing injunctive provisions, is appealable as effecting a substantial right. *Merchant v. Pielke*, 245.
5. The appealability of an order discharging an order to show cause why respondent should not be punished for contempt is not affected by Rev. Codes, § 5954, giving the accused in contempt proceedings a right to appeal. *Merchant v. Pielke*, 245.

ARREST OF JUDGMENT.

1. A motion in arrest of judgment will be denied when made upon any grounds excepting defects or alleged defects in the information or indictment. *State v. Montgomery*, 406.

ASSAULT AND BATTERY. See CRIMINAL LAW, 405.

1. An information for assault and battery while armed with a dangerous weapon, and with intent to do bodily harm, will sustain a verdict of guilty of assault and battery. *State v. Montgomery*, 405.
2. Where appellants were accused by an information of the crime of assault and battery while armed with a dangerous weapon, and with intent to do bodily harm, a conviction of simple assault was sustained. Assault is an offense, the commission of which is necessarily included in the offense charged. *State v. Montgomery*, 405.

ASSESSMENT AND TAXATION.

1. A county sought to secure judgments against certain lands for delinquent taxes thereon under the provisions of chapter 67 of the Laws of 1897. It appears that the land involved was sold to the county under article 19 of chapter 15 of the Compiled Laws, which authorized counties to become purchasers at tax sales. The sale to the county was in 1888 for the tax of 1887. In 1889 the same land was sold to an individual purchaser for the tax of 1888, who paid all subsequent taxes, and received a tax deed, which is conceded to have been regularly issued. *Held*, that the tax deed so issued cut off the rights of the county under the prior sale, and such county was not entitled to judgment for said taxes. *Emmons County v. Bennett*, 131.

ASSESSMENT AND TAXATION—Continued.

2. In the absence of a statute to the contrary, a tax deed regularly issued cuts off delinquent taxes for years previous to that upon which the deed is based. *Emmons County v. Bennett*, 131.
3. Affidavit and delinquent list *held* filed in due time, under Laws 1897, chapter 67, § 1. *Emmons County v. Lands of First Nat. Bank*, 583.
4. Call for special meeting of county commissioners to designate newspaper for publication of delinquent tax list *held* to sufficiently comply with the statute relating thereto. *Emmons County v. Lands of First Nat. Bank*, 583.
5. Facts stated in affidavits for vacation of certain tax judgments *held* not to affect the jurisdiction of the court to enter such judgments, nor operate to render them void. *Emmons County v. Lands of First Nat. Bank*, 583.
6. Laws 1897, chapter 67, construed, and *held*, that affidavit of clerk of District Court to delinquent tax list was sufficient. *Emmons County v. Lands of First Nat. Bank*, 583.
7. Order vacating judgments for delinquent taxes, and setting aside the tax sales thereunder, *held* erroneously made. *Emmons County v. Lands of First Nat. Bank*, 583.
8. Under the evidence, *held*, that a certified copy of the resolution designating a newspaper for publication of delinquent tax list was filed in due season. *Emmons County v. Lands of First Nat. Bank*, 583.
9. Where special session of county commissioners is held, under Rev. Codes, 1895, § 1848, to designate newspaper for publication of delinquent tax list, the object of the session must be stated in the notice with reasonable certainty. *Emmons County v. Lands of First Nat. Bank*, 583.
10. Affidavit on motion to vacate judgment and set aside tax sale on the ground that the judgment is null and void *held* insufficient, and order vacating the same erroneously entered. *Emmons County v. Thompson*, 598.
11. A tax sale will not be set aside because of mere irregularity in entry of the tax judgment. *Emmons County v. Thompson*, 598.
12. In entering judgment by default on delinquent tax list, the clerk of District Court *held* to act in ministerial capacity; and an order to enter judgment is not required by the tax act. *Emmons County v. Thompson*, 598.
13. On motion to set aside a tax judgment for mere irregularity, an omission of affidavit of merits or proposed verified answer *held* fatal. *Emmons County v. Thompson*, 598.
14. The fact of publication of delinquent tax list, coupled with the filing of affidavit of publication, *held* to confer authority to enter judgment by default. *Emmons County v. Thompson*, 598.
15. Certain lots were sold for taxes by a county auditor at the annual tax sale made in 1892, for the alleged taxes thereon for the year 1891, and were never redeemed from such sale. Thereafter said county auditor executed and delivered to the defendants tax deeds of said lots, and such deeds were regularly recorded. It appeared that the alleged taxes of 1891 were based on an attempted levy of taxes made by the commissioners at a meeting held on the first

ASSESSMENT AND TAXATION—Continued.

Monday in July, 1891, and that such levy was not made in specified amounts as required by § 6, chapter 100, Revenue Laws 1891. Said attempted tax levy was made pursuant to § 1589 of the Comp. Laws, which section was not then in force. *Held*, that such attempted levy of the taxes of 1891 was wholly without authority of law, and that the sale made pursuant to such levy was made without jurisdiction to sell. *Sweigle v. Gates*, 538.

16. Under § 1548, Comp. Laws, the assessor was required to list property in the name of the owner if known to him, and if not known, to list the same to unknown owners. This statute was mandatory and not merely directory, and hence an attempted assessment of lots, in which the assessor omitted to list the same in the name of the owner, or to unknown owners, or to any person whomsoever, was absolutely void. *Sweigle v. Gates*, 538.
17. Section 1620, Comp. Laws, required that the published notice of a tax sale should embrace a list of the lands to be sold and the amount of taxes due. The lots in controversy were situated in R. S. Tyler's addition to the city of Wahpeton. The published notice of tax sale began with the heading "Village of Lidgerwood." Descriptions of those lots followed, and then the following heading: "R. S. Tyler's Addition," not specifying the town and apparently relating back to the village of Lidgerwood. *Held*, that the notice of sale was insufficient. *Sweigle v. Gates*, 538.
18. The county auditor at an annual tax sale sold the lots in controversy to satisfy taxes which were based on a void assessment, and subsequently, no redemption from such sale having been made, executed tax deeds of said lots, based on said sale, and delivered the same to defendants. *Held*, that said tax deeds were executed and delivered without authority of law and were voidable for that reason. *Sweigle v. Gates*, 538.
19. Where tax deeds are voidable for jurisdictional reasons, as for the non-assessment of the lots described in the same, they do not start the statute of limitations running. *Sweigle v. Gates*, 538.
20. A legislative enactment which charges the entire cost of paving the streets of a city against the property abutting the paving and in proportion to frontage, is not in contravention of the 14th amendment to the Federal Constitution. *Webster v. City of Fargo*, 208.
21. In the exercise of the power of local assessment the legislature is not limited to the actual increase in value of the property assessed, resulting from the local improvement. *Webster v. City of Fargo*, 208.
22. Chapter 5 of the Laws of 1899, which relates to the assessment and taxation of grain in elevators, warehouses and grain houses, does not violate § 176 of the state constitution, which requires that laws shall be passed taxing by uniform rule all property according to its true value in money. Neither is such act obnoxious to subd. 23 of § 69 of the constitution, which prohibits the legislature from passing local or special laws for the assessment or collection of taxes; nor to § 11 of the constitution, which requires all laws of a general nature shall have a uniform operation, and is a valid enactment. *Minneapolis & Northern Elev. Co. v. Traill County*, 213.
23. Where property was exempt from taxation by the county, any pretended tax levied thereon by the county was void, and where such property was sold at tax sale for such void tax under the Revenue law of the state, Comp. Laws 1887, the purchaser acquired no lien whatever on the property, and if he voluntarily paid subsequent valid taxes thereon he cannot recover the amount so paid from the owner of the property. *McHenry v. Brett*, 68.

ASSESSMENT AND TAXATION—Continued.

24. The Place lands in the original grant of lands by Congress to the Northern Pacific Railway Company were exempt from taxation by the counties in which the same were located, until the same were surveyed in the field. *McHenry v. Brctt*, 68.
25. In the absence of a statute to the contrary, a tax deed regularly issued cuts off delinquent taxes for years previous to that upon which the deed is based. *Emmons County v. Bennett*, 131.
26. In case of bulky articles of personal property, a distress for taxes, good as against the taxpayer, may be made without an actual seizure of the property; it is sufficient if the officer holding the warrant gave the taxpayer, or its agent in charge, notice of seizure, and properly advertised the property for sale. *St. Anthony & Dak. Elev. Co. v. Bottineau County*, 346.
27. Where a tax collector, with the tax warrant in his possession, is bound under the law to seize and sell property for the payment of delinquent taxes, and is attempting so to seize and sell personal property, and where to avoid such seizure and sale the taxpayer pays an illegal and void tax under protest and with notice to the collector that action will be brought to recover the amount so paid, such payment is not voluntary, and may, in a proper action, be recovered; it is not necessary in such a case that the payment should be made to release such personal property from actual detention on the part of the collector. *St. Anthony & Dak. Elev. Co. v. Bottineau County*, 346.

ASSIGNMENTS.

1. A written instrument does not take effect until it is delivered, and to be effectual such delivery must be intentionally made with the purpose that the instrument shall become operative and have the effect to place it beyond the right to be recalled. *Erickson v. Kelly*, 12.
2. Defendant after a suit against one, Plummer, had just gained title to the land in controversy when plaintiff set up a claim to the same land by virtue of a written assignment signed by defendant and dated previous to the action against Plummer, given in consideration of the money and notes and delivery of which, was alleged. Defendant acknowledged having signed the instrument, but claimed it had never been delivered, that before the deal was completed she had refused to consummate it. The assignment never left the hands of the attorney acting for the parties and the money and notes were not tendered defendant until two and one-half years later, at the beginning of the action, which was evidence that there had been no intent on the part of plaintiff to consider the assignment operative until after defendant had secured a good title from Plummer and the land had almost doubled in value. *Held*, that the evidence did not show a delivery of the assignment with intent to make it operative. *Erickson v. Kelly*, 12.

ASSIGNMENT OF MORTGAGE.

1. Assignments of real estate mortgages are conveyances within the meaning of the recording law. *Henniges v. Paschke*, 489.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

1. Where the trust estate has been exhausted by the trustee for the benefit of creditors, and proper expenses incurred by the trustee remain unpaid, but large dividends have been paid by the trustee to the beneficiaries, the trustee may, in equity, require the beneficiaries to refund sufficient from the dividends so received to reimburse him for such expenses. *Wells-Stone Mer. Co. v. Aultman*, 520.
2. Where a trust deed for the benefit of creditors, authorized the trustee to close out business, and to that end to purchase such staple goods as would the better enable him to do so, and it appeared that the trustee was insolvent, the creditors who furnished such goods could be subrogated to the equities of the trustee as to the trust property, including the right to require the beneficiaries to refund, and this, too, though a portion of the goods were so delivered to the trustee after payment of the last dividend. *Wells-Stone Mer. Co. v. Aultman*, 520.
3. A trust deed for the benefit of creditors declared that the trustee should not be liable for errors or mistakes of judgment in the execution of the trust. In an action subsequently brought by the trustor against the trustee for an accounting, the court found the trustee delinquent in his accounts in a certain sum, but found that the trustee had been guilty of no dishonest act, and the delinquency was the result of accident, error, and misadventure in the conduct of the trust business. *Held*, that there was no liability on the part of the trustee. *Scott v. Jones*, 551.

ASSIGNMENTS OF ERROR. See APPEAL AND ERROR, 81, 553, 625.

1. Assignments of error upon the findings of fact of the trial court will be disregarded on appeal in cases tried under the provisions of chapter 5, Laws 1897, for the reason that in this class of cases the Supreme Court does not set for the correction of errors arising upon the evidence. *Erickson v. Citizens Nat. Bank*, 81.

ATTACHMENT. See JUSTICES OF THE PEACE, 204.

1. The right to apply for a second summons in attachment cases in Justice's Court is limited by the terms of the statute, which grants the right. *Searl v. Shanks*, 204.

ATTEMPTS. See CRIMINAL LAW, 149.

1. Upon a conviction for an attempt to commit the crime of sodomy defendant was properly and legally sentenced to five years in the penitentiary, the crime of sodomy being punishable to the extent of ten years in the penitentiary. *State v. King*, 149.

ATTORNEY GENERAL. See TAXATION, 115; INJUNCTION, 480.

1. The original jurisdiction of the Supreme Court in the issuance of writs of injunction can only be invoked upon an information filed by the attorney general, or under his authority, and by leave of court first obtained, and in the name of the state. *Anderson v. Gordon*, 480.
2. It is the duty of the attorney general to represent the state in actions pending in the Supreme Court whether the actions are civil or criminal, and also in tax cases. *Storey v. Murphy*, 115.

ATTORNEY GENERAL—Continued.

3. In cases which the attorney general is required to institute, as well as pending actions relating to the collection of taxes upon the lands of the Northern Pacific Railway Company, said official is given absolute control in the management of such cases and county commissioners, of counties interested in the collection of such taxes, are without authority to employ special counsel to attend to the duties thus imposed by law upon the attorney general. *Storey v. Murphy*, 115.

ATTORNEYS. See DISBARMENT, 379.

1. An erroneous statement by counsel in argument may be cured by the court's instruction. *Chilson v. Houston*, 498.
2. An attorney who receives money for his client, and without the knowledge, consent or authority of such client, loans such money to a third person for his own benefit, is guilty of embezzlement, and such offense constitutes grounds for disbarment. *In re Simpson*, 379.
3. Where an attorney settles an account upon which a suit is pending, and receives payment on such settlement, and thereafter conceals from his client the fact that the money has been paid and account settled, and continues prosecution of the case at his client's expense, such act is a deceit practiced upon a party to the action and is a ground for disbarment. *In re Simpson*, 379.
4. Duties of an attorney in this state, who is also state's attorney, as to the enforcement of the laws relating to the sale of intoxicating liquors, require state's attorneys to diligently prosecute any and all violations of such law; and makes the neglect or failure to do so a misdemeanor punishable both by fine and imprisonment, and forfeiture of office. Such misdemeanor involves moral turpitude and is a statutory ground for disbarment. *In re Simpson*, 379.
5. It is found under the evidence in this case that the accused in his capacity as an attorney at law committed the several offenses above referred to and his license to practice in the courts of this state is accordingly revoked and annulled. *In re Simpson*, 379.
6. The Supreme Court of this state, being clothed with the power to admit attorneys to practice has an incidental and inherent power and right to suspend and disbar them from practice for unprofessional conduct, and section 432, Rev. Codes, which purports to create such power in this court is merely a legislative affirmation of a power which already existed. *In re Simpson*, 379.

AUSTRALIAN BALLOT. See ELECTIONS, 450, 461, 464.

BAILIFFS. See SHERIFFS, 163.

BANKS AND BANKING

1. The issuance of a deposit slip by a bank, or the entry of a deposit in a pass book, has only the effect of a receipt for money, while it raises a presumption that the deposit was made, yet it is open to parole explanation. *Andrews & Gage v. State Bank*, 325.
2. Diemer was indebted to Andrews & Gage and applied to the bank for a credit for the amount for a few days, promising to then deposit to balance the credit, and such credit was given. The transaction amounted to a loan by the bank to Diemer of the amount, and when Diemer took a deposit slip in the name of Andrews & Gage for the amount, and also a pass book in their name, in which the deposit of the amount was entered, and delivered the same to Andrews & Gage as payment of his debt, the legal effect was a deposit by

BANKS AND BANKING—Continued.

- Andrews & Gage of the amount for which the credit was given, and the failure of Diemer to fulfill the promise upon which the credit was extended could not affect the legal rights of Andrews & Gage. *Andrews & Gage v. State Bank*, 325.
3. Where, at the time a national bank was placed in the hands of a receiver, another corporation had on deposit therein a certain sum of money, and was also liable to the bank on distinct contracts, such other corporation had the right to direct the application of the money so on deposit. *Tourtlot v. Whithed*, 467.
 4. Where the members of the board of directors of a bank have for months ceased to exercise the functions of their offices, and have abandoned the management and control of the corporation business entirely to the president of the bank, it will be presumed that such officer was authorized to do, in the name of the bank, whatever the bank might lawfully do, and no special authorization or ratification of his acts need be shown. *Tourtlot v. Whithed*, 467.
 5. A contract by the terms of which a national bank receives corporate stock of another corporation in payment of a debt owing to the bank by such other corporation is not *ultra vires* as to the bank when, at the time of making the contract, such corporation is financially embarrassed, and unable to meet its commercial obligations as they mature. Such contract is directly incidental to the proper exercise of the powers for which the bank was chartered. *Tourtlot v. Whithed*, 467.
 6. A contract of a corporation that is *ultra vires*, not because prohibited by positive law, or inherently vicious, and not because the corporation could not, under any circumstances, make the contract, but solely because of the existing circumstances and conditions under which it was made, is never void, and the plea of *ultra vires* will not avail either party to such contract when the contract has been fully executed by the other party. *Tourtlot v. Whithed*, 467.

BASTARDY.

1. Evidence considered and *held* that the verdict was justified by the evidence. *State v. Peoples*, 146.
2. In a bastardy case the court charged the jury, in substance, that it was a matter of common knowledge that the shortest period of gestation was about two hundred and sixty days. *Held*, proper. *State v. Peoples*, 146.

BILLS AND NOTES. See NEGOTIABLE INSTRUMENTS, 536.

BONA FIDE PURCHASER. See REAL ESTATE, 490.

BONDS ON APPEAL. See JUSTICE OF THE PEACE.

BROKERS. See PRINCIPAL AND AGENT, 285.

1. A real estate broker with whom lands are listed for sale by the owner cannot make contracts for the sale thereof which will bind the owners, in the absence of written authority signed by such owners. *Ballou v. Bergvendsen*, 285.

BUILDING AND LOAN ASSOCIATIONS.

1. A stockholder in a building and loan association, owning 16 shares of stock, received from the association the sum of \$800 in cash, and executed to the association his bond for \$1,600, being the amount received and the premium bid therefor, due in nine years from date, with interest upon \$800 at 6 per cent. per annum. The condition re-

BUILDING AND LOAN ASSOCIATIONS—Continued.

cited that the money was advanced by way of anticipation of the value of the stock at maturity; that the bond might be satisfied by paying the face thereof, or by maturing the said 16 shares of stock and surrendering the stock. The obligor bound himself to pay \$9.60 per month as dues on said stock until the same reached maturity or par, but the bond provided that in case of default the obligee might declare the whole bond due, and sue thereon and recover the sum of \$1,036.80, as liquidated damages for the breach of said bond, less the amounts that had been paid as monthly dues on stock. The amount stipulated as damages covered the monthly dues for a period of nine years. The bond was secured by mortgage. In an action brought by a receiver of the association to foreclose, *held*, that the transaction was a discount of the shares, and not a loan of money, and that the mortgage secured the payment of the monthly dues for the period of nine years, and that all monthly dues paid must be deducted from the amount stipulated, and judgment rendered for the remainder. *Clarke v. Olson*, 364.

2. Where the full sum so secured had been paid as and for monthly dues upon said stock before the receiver was appointed, said receiver can recover nothing upon the bond and mortgage. But, if the stock of the defendant had not in fact been matured by such payments, defendant's liability upon his original stock-subscription contract remained in full force, and the receiver has the same rights thereunder as against the defendant that he has to collect the unpaid stock subscription of any non-borrowing stockholder, and the principle of mutuality is not affected by the bond and mortgage. *Clarke v. Olson*, 364.
3. Where a building and loan association desires to do business in a state other than that in which it is chartered, and is authorized by its charter so to do, and in order to do so deposits, in compliance with the laws of such other state, its securities, in a specified amount, with the treasurer of such state, to be held in trust for the benefit of the shareholders and creditors in such state, and receives its license from such state to transact business therein, and so transacts business for a number of years, such association cannot, upon subsequent insolvency, nor can a shareholder not resident of such other state, plead that the act of the association in making such deposit of securities was ultra vires. *Clarke v. Olson*, 364.

BURDEN OF PROOF. See EVIDENCE, 12, 263, 512, 536, 580; NEGOTIABLE INSTRUMENTS, 536.

1. In an action by an indorsee of a negotiable promissory note to recover thereon against the maker, when evidence is introduced which shows that such note was obtained by fraud, and was without consideration, the burden shifts to the plaintiff to establish by competent evidence that he is a good faith purchaser, in due course and without notice. *Mooney v. Williams*, 329.
2. Where a stipulation of facts has been signed as evidence upon which the case is to be determined, which recites that the note in suit was indorsed by the payee to the plaintiff before maturity for a valuable consideration, in the ordinary course of business, and without notice, the legal effect of such stipulation is to sustain the burden of proof cast on the plaintiff, and to cut off the defense of fraud, and want of consideration. *Mooney v. Williams*, 329.
3. Where a bond offered in evidence showed that the name of a surety, after being affixed, had subsequently been erased, the legal presump-

BURDEN OF PROOF—Continued.

- tion was that the erasure was innocent, the bond was primarily admissible in evidence, and the burden of proof rested upon the other signers to show that their implied contract of contribution had been altered by the erasure. *Cass County v. American Exch. Bank*, 263.
4. The burden of proof in an action to annul a deed on the ground of material alteration after its execution rests on the plaintiff to show the alteration, and the evidence must be clear, strong and convincing. *Riley v. Riley*, 580.
 5. The plea of payment in his answer to the complaint for a liquidated demand confesses the cause of action and casts the burden of proof upon the defendant to sustain such plea. *Lokken v. Miller*, 512.
 6. In an action upon a negotiable note by an indorsee thereof, the mere allegation in the answer of fraud in the inception of the note does not throw upon plaintiff the burden of proving that he is a good faith holder. The burden is thrown upon him only after the fraud has been established. *Ravicz v. Nickells*, 536.

CANCELLATION OF INSTRUMENTS.

1. In an action to set aside a deed on account of the fraud of the purchaser, the plaintiff lived in Canada, the land was located in North Dakota and it was occupied by plaintiff's brother. Plaintiff testified that she was dissatisfied with the sale because her brother did not get his money out of it. That at the time of the sale defendant said the brother had made enough out of the land to repay his outlay. The price paid for the land was \$950.00. Plaintiff's brother had written her a short time before offering her \$700.00. Parties acquainted with the land had told plaintiff she was getting a bargain. Three weeks elapsed before the deed was given and before it was signed the brother telegraphed plaintiff not to do so, but after considering the matter with her family plaintiff had executed the deed. *Held*, insufficient to warrant setting the deed aside. *Heyrock v. Surerus*, 28.
2. Where A executed and delivered to B his non-negotiable promissory note secured by mortgage, and B in consideration thereof agreed to have certain claims against A, held by third parties, and liens on the mortgaged property, released and satisfied, no time for performance being fixed. B thereafter sold the note and assigned the mortgage to C. In an action by A against C to have the note and mortgage cancelled, *held*, that the action could not be maintained. *Tronson v. Colby University*, 559.

CERTIFICATES OF NOMINATION. See ELECTIONS, 464, 461, 450.

CHATTEL MORTGAGES. See EVIDENCE, 319; CONSIDERATION, 319.

1. Section 4681, Rev. Codes, was enacted to prevent taking mortgages on crops for an indefinite number of years. It never was intended to avoid a mortgage of the crop for the existing year whether matured or not. *Schweinber v. Great Western Elev. Co.*, 113.
2. In the absence of testimony the law presumes that a chattel mortgage is delivered on the day of its date. *Schweinber v. Great Western Elev. Co.*, 113.
3. Where the owner of a chattel mortgage authorized and requested the mortgagor to haul away the wheat covered by the mortgage, and sell the same, and pay him (the mortgagee) with the proceeds, *held*,

CHATTEL MORTGAGES—Continued.

that such consent to a private sale of the property operated as an implied waiver of the lien of the mortgage, whereby the mortgage was defeated. *Peterson v. Elevator Co.*, 55.

4. A written instrument is presumptive evidence of consideration, therefore, it is proper to receive a chattel mortgage in evidence over an objection that it was without consideration, no evidence having been offered to overcome the statutory presumption of consideration. *First Nat. Bank v. Red River Valley Nat. Bank*, 319.
5. A mortgage of personal property not then owned by the mortgagor will not attach to such property as a lien thereon until the mortgagor acquires some title or interest therein. *Bidgood v. Monarch Elev. Co.*, 627.
6. A mortgage was executed by a tenant upon a portion of a crop that he expected thereafter to raise under a lease which declared that the entire title and right of possession of said crop should remain in the landlord, and the tenant could acquire no right, title or interest until the crop was divided by the landlord, and the portion to which the tenant was entitled under the lease delivered to him. The specific grain raised was never divided, but was delivered to an elevator for general storage, and subsequently the parties agreed upon their respective shares, and general storage checks were delivered by the elevator to each party for the number of bushels to which he was entitled. *Held*, that the tenant never acquired any interest in the specific grain raised to which the mortgage lien could attach. *Bidgood v. Monarch Elev. Co.* 627.

CLAIM AND DELIVERY.

1. In an action to recover the possession of personal property, the complaint, without referring to items, stated that the total value of the property described in the complaint was \$1,500. The answer denied such value, and alleged that the total value of the property was \$2,000. The sheriff seized and turned over to plaintiff a portion only of the property described in the complaint, and in his return described the property so seized by items, and with particularity. The verdict was for defendants, and fixed the value of the property seized by the sheriff, and described in his return, at \$2,000. There was no evidence offered of the value of the property seized. A motion for a new trial was made upon the ground, among others, that the verdict as to the value of the property was not justified by the evidence. Pending this motion, by leave of court, defendant filed a remittitur of the excess of the verdict about \$1,500.00, and claimed that plaintiff was bound by averments in his complaint as to the value of the property in controversy. The motion for a new trial was granted. *Held*, that the order granting a new trial was proper. The allegations and admissions in the pleadings were made with reference to the lump value of certain property described in the complaint, and these could not be resorted to in fixing the value of a different mass of property, viz: that seized by the sheriff. *Northwood Trust & Safety Bank v. Magnussen*, 151.

COLLATERAL ATTACK. See JUDGMENTS, 428, 446.

COLLUSION. See JUDGMENTS, 428, 446.

CONCLUSIONS OF LAW. See PRACTICE, 239.

CONDONATION. See DIVORCE, 192.

1. Cohabitation operates in law as a condonation of all causes of action for divorce existing prior to such voluntary cohabitation. *Gardner v. Gardner*, 192.
2. Condonation implies a condition subsequent that the forgiving party must be treated with conjugal kindness. *Gardner v. Gardner*, 192.
3. The condonation of the offenses set out in the answer as recrimination in this case was not followed by conjugal kindness on plaintiff's part, and hence such condonation is ineffectual for any of the purposes of the case. *Gardner v. Gardner*, 192.

CONSTITUTIONAL LAW. See LIMITATION OF ACTIONS, 1; INJUNCTIONS, 480; TAXATION, 213.

1. In all cases where the legislature shortens a statutory period of limitation and makes the amended law apply to existing causes of action it must fix a time within which actions may be brought upon existing causes that would otherwise be barred by the amended law; and if the time so fixed is so short that it amounts to a practical denial of an opportunity to sue, courts will declare the time unreasonable and the act unconstitutional on the ground that it deprives the party of his property without due process of law. *Osborne v. Lindstrom*, 1.
2. The state constitution, § 87, confers upon the Supreme Court power to issue writs of injunction. Such writ is, under the mandate of the constitution, a jurisdictional writ, because it is only through the writ that the court obtains original jurisdiction of the controversy. The application for leave to file an information must be made by the attorney general in the name of the state, or the writ will be denied. *Anderson v. Gordon*, 480.
3. Section 4795, Rev. Codes, giving courts authority, under conditions stated, to order real estate to be sold and the proceeds to be divided between the mortgagee, who had the first lien upon the land, and the mechanic's lienholder, who had the first lien upon the building, does not impair the obligation of the mortgage existing upon said land before the building was erected and before the law was passed. *Craig v. Herzman*, 140.
4. The statute authorizing the sale of real estate and the division of the proceeds between the mortgagee, who had the first lien on the land, and a mechanic's lien holder, who had the first lien on the building, relates to procedure only and may be applied in any case tried after its enactment, although the cause of action arose before the enactment. *Craig v. Herzman*, 140.
5. The rule requiring statutes to be given prospective operation only does not apply to statutes relating to procedure. *Craig v. Herzman*, 140.
6. The repeal of the mechanic's lien law as it existed in the Compiled Laws by the enactment of the Revised Codes did not operate to extinguish liens that had been acquired under the prior law, where a mechanic's lien has attached under the law in force at that time, the holder's right thereto became vested and cannot be destroyed by the repeal of the law. *Craig v. Herzman*, 140.
7. Chapter 5 of the Laws of 1899, which relates to the assessment and taxation of grain in elevators, warehouses, and grain houses, does not violate section 176 of the state constitution, which requires that "laws shall be passed taxing by uniform rule all property according to its true value in money." Neither is such act obnoxious to subdivision 23 of section 69 of the constitution, which prohibits

CONSTITUTIONAL LAW—Continued.

the legislature from passing local or special laws for the assessment or collection of taxes; or to section 11 of the constitution, which requires that all laws of a general nature shall have a uniform operation,—and is a valid enactment. *Minneapolis & N. Elev. Co. v. Trail County*, 213.

8. To give validity to tax deeds based upon illegal assessments would be to deprive the owner of his property without due process of law. *Sweigle v. Gates*, 538.
9. A legislative enactment which charges the entire cost of paving the streets of a city against the property abutting the paving, and in proportion to frontage, is not in contravention of the 14th amendment to the Federal Constitution. *Webster v. City of Fargo*, 208.
10. In exercising the power of local assessment the legislature is not limited to the actual increase in value of the property assessed, resulting from the local improvement. *Webster v. City of Fargo*, 208.

CONSIDERATION. See CONTRACTS, 319; CHATTEL MORTGAGES, 319; EVIDENCE, 319.

CONTINUANCE. See CRIMINAL PROCEDURE, 175.

1. Where defendant's affidavit for a continuance in a prosecution of a robbery committed on September 25 stated that he expected to prove by non-resident witnesses that he was in Missouri on the day the offense was alleged to have been committed, but did not state as a matter of fact that he was in Missouri at such time, and the affidavits of such non-residents merely declared that the defendant was in Missouri on, before, and after the 14th of September, the foundation for the motion was insufficient in substance, and the motion was properly refused. *State v. Murphy*, 175.

CONTEMPT. See INTOXICATING LIQUORS, 245; INJUNCTIONS, 245.

1. The perfecting of an appeal from a decree containing injunctive provisions and the filing of a supersedeas can have no retroactive effect so as to purge a contempt committed by appellant while the decree was in full force. *Merchant v. Pielke*, 245.
2. Plaintiff obtained a decree against defendant containing injunctive provisions. After the entry of the decree defendant violated the injunctive provisions. Plaintiff obtained an order on defendant to show cause why he should not be adjudged in contempt. *Held*, that the proceeding set forth a civil and not a criminal contempt and was properly instituted by plaintiff to enforce obedience to the decree in his favor, under Rev. Codes, § 5934, giving courts power to punish civil contempts. *Merchant v. Pielke*, 245.
3. Under Rev. Codes, § 5626, specifying what orders are appealable, an order discharging an order to show cause why respondent should not be punished for contempt, for violation of a decree against defendant containing injunctive provisions, is appealable as affecting a substantial right. *Merchant v. Pielke*, 245.

CONTRACTS.

1. The mere doing of an act which one is under legal obligation to perform does not furnish a consideration which will support a new contract. *Chilson v. Bank of Fairmount*, 96.

CONTRACTS—Continued.

2. A contract will be reformed where by mutual mistake it fails to express the true intention of the parties. *Merchant v. Pielke*, 182.
3. A written contract imports a consideration and casts the burden of showing a want of consideration upon the parties seeking to avoid it. *First Nat. Bank v. Red River Valley Nat. Bank*, 319.
4. The contracts made by the county commissioners of Kidder county whereby special counsel were employed to prosecute proceedings for the collection of taxes against the lands of the Northern Pacific Railway Company upon an agreement by which they were to receive as compensation for such service out of the proceeds of their collections, twenty-five per cent thereof, was *held* ultra vires and void. *Storey v. Murphy*, 115.
5. A contract by the terms of which a national bank receives corporate stock of another corporation in payment of a debt owing to the bank by such other corporation is not ultra vires as to the bank when, at the time of making the contract, such corporation is financially embarrassed and unable to meet its commercial obligations as they mature. Such contract is directly incidental to the exercise of the powers for which the bank was chartered. *Tourtlot v. Whithed*, 467.
6. A contract of a corporation that is ultra vires, not because prohibited by positive law or inherently vicious, and not because the corporation could not, under any circumstances, make the contract, but solely because of the existing circumstances and conditions under which it was made, is never void, and the plea of ultra vires will not avail either party to such contract when the contract has been fully executed by the other party. *Tourtlot v. Whithed*, 467.
7. A delivered to B his negotiable promissory note and secured the same by mortgage on realty. B agreed to have certain claims against A, which were held by third parties and which were liens on such realty, satisfied of record. No time for performance being fixed, B sold the note and assigned the mortgage to C, but failed to have the prior liens satisfied in whole or in part. *Held*, that an action against C to have the note and mortgage cancelled for failure of consideration could not be maintained, since the promise to pay, made by A, and the promise to procure satisfactions, made by B, were independent promises, a breach of either furnishing an undisputed cause of action to the other and they could not become dependent by lapse of time. *Tronson v. Colby University*, 559.

CONVERSION. See TROVER AND CONVERSION NOTE, 637.

1. The measure of damages for the wrongful conversion of personal property may be the highest market value at any time between the conversion and the verdict when the action has been prosecuted with reasonable diligence. *First Nat. Bank v. Red River Valley Nat. Bank*, 319.
2. Where the facts upon the question of diligence are not in dispute, the question as to whether reasonable diligence has been exercised is to be determined by the court as a question of law; the reasonable diligence of the suitor relates both to the commencement of an action and the subsequent prosecution. *First Nat. Bank v. Red River Valley Nat. Bank*, 319.
3. In an action of conversion the grain was taken from the possession of the tenants on September 11th, 1896, and the action was not commenced until February 23rd, 1897, more than 5 months later,

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CONVERSION—Continued.

but the demand for possession did not occur until the last named date. *Held*, that the conversion occurred when the defendant refused plaintiff's demand for possession, which was the day the suit was commenced. In fixing the measure of damage the court determined that plaintiff was entitled to the highest market price of the grain between the date of the conversion and the verdict, and permitted plaintiff to amend its complaint at the trial to increase the amount of its demand for damages to correspond with the highest price of grain during this period, which was stipulated to have been, in June, 1898, \$1.42 per bushel, twice its value at the date of conversion. Verdict sustained. *First Nat. Bank v. Red River Valley Nat. Bank*, 319.

4. A tenant cannot maintain conversion against the purchaser of a crop raised by him under a contract that the title and right of possession of crops raised shall remain in the landlord until division, and where no division was made prior to sale. *Bidgood v. Monarch Elev. Co.*, 627.

CONVEYANCES. See REAL ESTATE, 490.

CORPORATIONS. See FOREIGN CORPORATIONS, 112; BUILDING AND LOAN ASSOCIATIONS, 364.

1. Where a building and loan association, authorized to do business in another state, deposits securities with the state treasurer of such other state, to be held in trust for the benefit of stockholders and creditors, in compliance with the laws thereof, and receives its license from such state to transact business therein, and does so transact business for a number of years, neither it nor its shareholders, not residents of such other state, will be permitted on the subsequent insolvency of the association to plead that the act of making such deposition of securities was ultra vires and void. *Clarke v. Olson*, 364.

COUNTIES. See FORGERY, 425.

1. Counties cannot enter into contracts which are not expressly or impliedly authorized by statute or organic law, and agreements entered into in excess of such authority are void. *State v. Ryan*, 419.
2. An agreement between a board of county commissioners and an attorney whereby in return for his service in aiding the state's attorney to collect taxes against railroad lands, the latter was to receive twenty-five per cent. of any amount recovered either in money or lands, out of which one-fifth was to be paid the state's attorney. *Held*, ultra vires as to the county commissioners and void. *Storey v. Murphy*, 115.
3. Section 7, chapter 67, Laws 1897, providing for the employment of an attorney to assist the state's attorney in cases brought under said chapter does not provide for such employment before an answer has been filed setting forth a denial or objection to the tax sought to be put in judgment pursuant to the act. *Storey v. Murphy*, 115.
4. Under section 1, chapter 120, Laws 1897, which provides that after July 1st, 1897, the attorney general is to take charge of all pending litigation between the state and the counties thereof against the Northern Pacific Railway Company or its receivers, in regard to unpaid taxes on their lands, a board of county commissioners has no authority to employ special counsel to perform professional service in relation to the collection of said taxes. *Storey v. Murphy*, 115.

COUNTIES—Continued.

5. Under section 1988, Revised Codes, which provides that the judge of the District Court may appoint special counsel to assist the state's attorney in important cases and that such counsel shall be paid a reasonable fee therefore, to be approved by the court and paid by the county. The board of county commissioners are without authority to appoint special or additional counsel in cases when the state's attorney is required to appear officially as counsel. *Storey v. Murphy*, 115.

COUNTY AUDITOR. See ELECTIONS, 461.

COUNTY COMMISSIONERS. See COUNTIES, 115.

1. County commissioners are without authority to employ special counsel to assist the state's attorney in collecting taxes against the lands of the Northern Pacific Railway Co. *Storey v. Murphy*, 115.
2. The board of county commissioners have no authority to offer a bounty, payable from the general county fund for the destruction of gophers, or to make provision for the payment of such bounty out of the county fund upon the production of a certificate from the township clerk showing the facts of presentation, counting, and destruction of gopher tails. *State v. Ryan*, 419.

COUNTY COURTS. See JURISDICTION, 428; JUDGMENTS, 428; JUSTICES OF THE PEACE, 100.

1. A judgment entered by a County Court of this state, upon the final accounting of an executor, is of equal rank with a judgment entered in other courts of record, and is not conclusive as against collateral attack upon jurisdictional grounds and those of collusion and fraud. *Joy v. Elton*, 428.
2. County Court has jurisdiction to compel an administrator to make an accounting even though his appointment was a nullity. *Dobler v. Strobel*, 104.

COUNTING UPON STATUTE. See PLEADING, 81.

COURT RULES. See APPAL AND ERROR, 81.

COVENANTS. See DEEDS, 331.

1. The statute, sections 3784-3787, Rev. Codes, which declares what covenants in grants of real property run with the land and designates a part of such covenants by name, does not confine covenants which run with the land to this specific name, but such covenants as by reason of their character are within the meaning of said sections, also run with the land. *Northern Pacific Ry. Co. v. McClure*, 73.
2. A covenant to save a railroad lessor harmless from loss of property on demised premises from fires set by a lessor's engines, *held*, to pass to lessor's assignee under the transfers of all its property. *Northern Pacific Ry Co. v. McClure*, 73.

CREDITORS. See JUSTICES OF THE PEACE, 100.

1. A creditor is not exempted by section 6258, Rev. Codes, from giving the cost bond on appeal to District Court required by section 6772, Rev. Codes. *Richardson v. Campbell*, 100.

CREDITOR'S BILL. See ESTOPPEL, 255; HOMESTEADS, 255.

CRIMINAL LAW. See FORGERY, 319; INDICTMENT AND INFORMATION, 409; FALSE PRETENSES, 409; VERDICT, 405.

1. The practice of defining, or attempting to define, reasonable doubt, condemned. *State v. Montgomery*, 405.
2. In the course of its charge the court defined a reasonable doubt to be "a doubt that the reasonable man can present and explain." *Held*, that this definition, while open to criticism, was not prejudicial. *State v. Montgomery*, 405.
3. Upon an information accusing defendants of the crime of assault and battery while armed with a dangerous weapon, and with intent to do bodily harm, the jury found them "guilty of an assault with provocation." *Held*, that the words "with provocation" did not render the verdict obscure in meaning, nor import that the accused were guilty of any offense other than assault. Verdict and conviction sustained. *State v. Montgomery*, 405.
4. Under an information accusing defendants with assault and battery while armed with a dangerous weapon, and with intent to do bodily harm, the conviction of an assault was proper, as an assault is an offense the commission of which is necessarily included in the offense charged. *State v. Montgomery*, 405.
5. A motion in arrest of judgment will be sustained only because of defects in the information and not for errors of procedure at the trial and in the verdict. *State v. Montgomery*, 405.
6. In actions brought under § 7605, Rev. Codes, to abate a liquor nuisance, tried to the court without a jury, and upon appeal the statement of the case did not set out the evidence, nor demand a trial anew of the whole case or of any specified issue, errors in admission of evidence will not be considered. *State v. McGruer*, 566.
7. Where the evidence is conflicting, and there is substantial evidence to sustain the verdict, the verdict will not be disturbed on the ground of alleged insufficiency of the evidence to sustain it. *State v. Montgomery*, 405.
8. Where the accused were informed against for the crime of assault and battery with a dangerous weapon, with intent to do bodily harm, the jury were instructed: "An assault is any willful or unlawful attempt or offer, with force or violence, to do a corporal hurt to another. If you find in this case that there was an assault committed, but it was not made with a dangerous weapon, and was not made with any intent to do bodily harm to the person of Kennedy, then it would be your duty to render a verdict of guilty of an assault." *Held*, that this instruction does not invade the province of the jury, and the same is sustained. *State v. Montgomery*, 405.
9. An attorney who receives money for his client, and without the knowledge, consent or authority of such client, loans such money to a third party for his own benefit, is guilty of embezzlement under § 7464, Rev. Codes. *In re Simpson*, 379.
10. Under § 7604, Rev. Codes, state's attorneys are required to diligently prosecute any and all violations of the prohibition law, and the neglect or failure to do so is a misdemeanor punishable by both fine and imprisonment and forfeiture of office. *In re Simpson*, 379.
11. An attorney who receives money for his client and without the knowledge, consent or authority of such client, loans such money to a third person, for his own benefit, is guilty of embezzlement

CRIMINAL LAW—Continued.

under § 7464, Rev. Codes, and such offense constitutes ground for disbarment. *In re Simpson*, 379.

12. The information charged, or attempted to charge, defendants with the crime of murder in the second degree, committed while they were engaged in the commission of a felony defined by § 7177, Rev. Codes, relating to the crime of producing the miscarriage of a pregnant woman. The facts constituting the offense, defined in § 7177, were set out in the information. Nevertheless, the information did not charge two distinct and independent offenses, and hence the demurrer thereto, upon the ground of duplicity, was properly overruled. *State v. Belyea*, 353.
13. All averments in an information relating to a subordinate felony may properly and necessarily be inserted in an information as descriptive of the major offense without rendering the information duplicitous. *State v. Belyea*, 353.
14. The subordinate felony defined by § 7177, Rev. Codes, is foreign to, and not generically connected with, the offense of murder in the second degree, and hence is not necessarily included in the commission of the crime of murder in the second degree, as defined by subd. 3, § 7058, Rev. Codes. *State v. Belyea*, 353.
15. An indictment for forging an instrument, which upon its face does not purport to create any liability, must allege the extrinsic facts which are relied upon to give such instrument validity as creating an obligation. *State v. Ryan*, 419.
16. Indictment examined and found insufficient to charge the offense of uttering a forged instrument, for the reason that it appears upon the face of the indictment, by the extrinsic facts pleaded, that the instrument alleged to have been uttered by the accused neither created, nor purported to create, any liability. *State v. Ryan*, 419.
17. The false pretense referred to in section 7489, Rev. Codes, which provides the punishment for obtaining the signature or property of another by color or aid of any false token or writing or other false pretense, is such a fraudulent representation of an existing or past fact, by one who knows it not to be true, as is adapted to induce the person to whom it is made to part with something of value. *State v. Stewart*, 409.
18. A false pretense may consist of oral or written representations and is sufficient if adapted to deceive the person to whom presented, and if it in fact does deceive him. *State v. Stewart*, 409.
19. The question whether false pretenses set out in an indictment as the basis of prosecution are adapted to deceive is for the jury, unless they are in their nature so absurd and incredible that a conviction would not be sustained. The test of the sufficiency of the false pretenses is not whether they would deceive a person of ordinary caution and prudence, but whether they did in fact deceive the person alleged to have been defrauded. *State v. Stewart*, 409.
20. A false representation made to an agent of the person from whom the money or property is obtained, and communicated to and acted upon by such person, is equally punishable as though made to him directly. *State v. Stewart*, 409.
21. Where the defendant fraudulently obtained money from Sargent county by presenting to the county auditor of that county a false certificate as the basis for a claim for a bounty theretofore offered

CRIMINAL LAW—Continued.

- by the board of county commissioners for the destruction of gophers, the question whether said certificate, when considered with the other averments of the indictment, was calculated to, and did deceive the county auditor, was for the jury; the pretense being neither absurd nor incredible. *State v. Stewart*, 409.
22. A written instrument which shows upon its face that it neither creates nor purports to create any liability on the part of any one, is not the subject of forgery, unless extrinsic facts exist which give to it that character. *State v. Ryan*, 419.
 23. Under sections 8385-8389, Rev. Codes, prescribing the method of obtaining the depositions of non-resident witnesses, an application in a criminal action for a continuance or postponement to take non-resident testimony cannot be granted, except in connection with an application for a commission. *State v. Murphy*, 175.
 24. Where defendant's affidavit for a continuance in a prosecution for a robbery committed in North Dakota on September 25th stated that he "expected to prove by non-resident witnesses" that he was in Missouri on the day the offense was alleged to have been committed, but did not state as a matter of fact that he was in Missouri at such time, and the affidavits of such non-residents merely declared that the defendant was in Missouri on, before, and after the 14th of September, the foundation for the motion was insufficient in substance, and the motion was properly refused. *State v. Murphy*, 175.
 25. A verbal error of the court in referring to the date of the offense as September 25th, 1899, when the true date as charged was September 25th, 1895, was harmless, where the erroneous reference could not operate to create confusion in the minds of the jurors as to the time of the commission of the offense, nor otherwise prejudice the defendant's rights. *State v. Murphy*, 175.
 26. An information for arson and which charged facts constituting arson in the third degree is sufficiently specific as to the crime charged and does not accuse of one crime and state facts constituting a different crime. *State v. Young*, 165.
 27. In a criminal case where evidence was entirely circumstantial the following instruction was *held* prejudicial: "The law requires the jury to be satisfied of the defendant's guilt beyond reasonable doubt, but in order to warrant a conviction does not require that you should be satisfied beyond a reasonable doubt of each link in the chain of circumstances relied upon to establish the defendant's guilt. It is sufficient, if, after taking the testimony altogether as a whole, you are satisfied beyond a reasonable doubt of the guilt of the defendant." This error was not cured by reason of the fact that the court in other parts of the instructions correctly stated the doctrine of reasonable doubt. *State v. Young*, 165.
 28. Failure to instruct the jury on a particular phase of the evidence cannot be urged as prejudicial error in the absence of a request so to do. *State v. Rosencrans*, 163.
 29. The fact that a sheriff and deputy sheriff are sworn as witnesses in a criminal case does not, of itself, operate to disqualify them, from acting as bailiffs in charge of the jury during their deliberations. *State v. Rosencrans*, 163.
 30. Where the defendant in a criminal case desired a postponement of the trial or a continuance of the action over the term to obtain the testimony of non-resident witnesses it is incumbent upon him to

CRIMINAL LAW--Continued.

- apply to the court or judge upon notice to the county attorney for the issuance of a commission out of and under the seal of the court to take such testimony, and an application for a continuance to take such non-resident testimony cannot be granted except in connection with the application for continuance. The statute regulates the practice in such cases and its provision must be substantially complied with. *State v. Murphy*, 175.
31. Under section 8141, Rev. Codes, any cause that would be considered a good one for a postponement in a civil action is sufficient in a criminal action provided the ground of the application is not that of obtaining the testimony of a non-resident to be used in defendant's behalf in a criminal action. Postponements for such cause to prevent abuse and vexatious delays have been made the subject of specific legislative regulation, and these must govern to the exclusion of other and different applications for delays and postponements of trial where the same are made on other grounds. *State v. Murphy*, 175.
 32. Where defendant made application for continuance to obtain the testimony of absent witnesses to prove an alibi, the affidavits used in support of his motion failed to state as a fact that the defendant was not in the county and state charged on the date the crime was alleged to have been committed, or that the defendant was in a foreign state on that day, but stated generally that defendant expected to prove by his witnesses that he was in Missouri on that day. The affidavit did not state to what facts the witnesses would testify, nor did it state that the matters to which they would testify were true, or that the facts that he expected to grove by them were true. *Held*, that the affidavit was insufficient to obtain a continuance. *State v. Murphy*, 175.
 33. Upon an information charging robbery the court in instructing the jury by inadvertance referred to the date of the commission of the offense charged as occurring on September 25th, 1899, whereas the true date as charged was four years prior thereto. This erroneous reference to the date of the offense was repeated in the charge. It is also true that the court more than once in its instructions referred to such date correctly. *Held*, under the facts of the case, that such error was without prejudice. *State v. Murphy*, 175.
 34. The measure of punishment which may be legally imposed upon one convicted of attempting to commit the crime of sodomy is provided by subd. 1 of section 7694, Rev. Codes. The above subdivision fixes the punishment of attempts to commit crimes which are punishable by four or more years' imprisonment in the penitentiary, or by imprisonment in the county jail, at not to exceed one-half of the longest term prescribed for the completed offense. *Held*, that the petitioner, who was convicted of an attempt to commit the crime of sodomy, and sentenced to five years in the penitentiary, was legally sentenced; the crime of sodomy being punishable to the extent of ten years in the penitentiary. *State v. King*, 149.
 35. The false pretense referred to in section 7489, Rev. Codes, which provides the punishment for obtaining the signature or property of another by color or aid of any false token or writing, or other false pretense, is such a fraudulent representation of an existing or past fact, by one who knows it not to be true, as is adapted to induce the person to whom it is made to part with something of value. *State v. Stewart*, 409.

CRIMINAL LAW—Continued.

36. The false pretense may consist of oral or written representations, and when in writing it is not necessary, as in a prosecution for forgery, that such writing shall purport to create a right or obligation. It is sufficient if it is adapted to deceive the person to whom presented, and in fact does deceive him. *State v. Stewart*, 409.
37. The question of whether false pretenses set out in an indictment as the basis of prosecution are adapted to deceive is for the jury, unless they are in their nature so absurd and incredible that a conviction would not be sustained; and the test of the sufficiency of the false pretense is not whether they would deceive a person of ordinary caution and prudence, but whether they did in fact deceive the person alleged to have been defrauded. *State v. Stewart*, 409.
38. A false representation made to an agent of the person from whom the money or property is obtained, and communicated to and acted upon by such person, is equally punishable as though made to him directly. *State v. Stewart*, 409.
39. The defendant is charged with the crime of obtaining money by aid of a false token. It is alleged that he fraudulently and designedly obtained money from Sargent county by presenting to the county auditor of that county a false certificate as the basis for a claim for a bounty theretofore offered by the board of county commissioners for the destruction of gophers. *Held*, that the question whether said certificate, when considered with the other averments of the indictment, was calculated to deceive, and did deceive, the county auditor, was for the jury; the pretense being neither absurd nor incredible. *Held*, further, that the indictment sufficiently alleges that the money was obtained from the county by aid of such false pretense, and is not open to the objection that it shows upon its face that the defendant obtained property, to-wit: a warrant for the money, by aid of such false pretense, instead of money. *State v. Stewart*, 409.

CRUELTY. See DIVORCE, 188, 192.

CUSTOM AND USAGE. See INSURANCE, 19.

DAMAGES.

1. The measure of damages recoverable for the wrongful conversion of personal property is fixed by section 5000, Rev. Codes. The injured party may recover the highest market value at any time between the conversion and verdict when the action has been prosecuted with reasonable diligence. *First Nat. Bank v. Red River Valley Nat. Bank*, 319.
2. Where the facts as to diligence are not in dispute, the question whether a case has been prosecuted with reasonable diligence is one for the court. It is necessary in order to secure a review of the determination of the trial court thereon upon appeal, to bring upon the record and before the Supreme Court all of the facts upon which such determination was made. *First Nat. Bank v. Red River Valley Nat. Bank*, 319.

DEEDS. See ALTERATION OF INSTRUMENTS, 580.

1. The defendants conveyed to the plaintiff a tract of land by a deed of warranty embracing, in addition to the usual covenant for peaceable possession and quiet enjoyment, the following as to incumbrances: "That the same are free from all incumbrances, except a first mortgage for two hundred and fifty dollars." Said mortgage had been given to secure a loan of \$250, to be paid in five years, with interest at 10 per cent. A note for the principal, with interest at 7 per cent., payable annually until maturity of the principal debt, was

DEEDS—Continued.

given to the borrower, and the mortgage referred to in the deed was given to secure such note. The borrower also gave the lender a series of small notes falling due concurrently with the interest payments on the 7 per cent. note. Said small notes drew no interest prior to their maturity, and aggregated \$35.50. A mortgage was given to secure said small notes, but was not referred to in the deed, and neither the grantors or the grantee knew of its existence. The mortgages were of even date, both given to secure the loan of \$250, and interest, and were part and parcel of the same transaction. Under the terms of the sale plaintiff agreed to pay said debt of \$250, as a part of the price of the land, and at that time plaintiff knew that the debt drew interest at 10 per cent. Plaintiff, after paying interest on the principal for three years at 10 per cent., ceased to pay interest, and subsequently the small mortgage was foreclosed and the premises sold for a balance of \$18.50 then due, and plaintiff was evicted. Plaintiff sues to recover the amount of the purchase money paid by him, and alleges a breach of defendant's covenant for peaceable possession and quiet enjoyment arising by reason of eviction. *Held*, that plaintiff cannot recover since the small mortgage was given to secure the principal debt and interest, which he had agreed to pay. *Laderoute v. Chale*, 331.

2. A deed of real estate to be effective as a conveyance of title must designate a grantee, otherwise no title passes; but it is sufficient if the deed, when construed as a whole, distinguishes the grantee from the rest of the world. *Henniges v. Paschke*, 489.
3. A deed of real estate in the following language: "Know all men by these presents, That I, F. T. Walker and Maggie J. Walker, his wife, of Sioux county and state of Iowa, in consideration of the sum of one thousand (\$1,000) dollars, in hand paid by John P. Walker, of Walsh county, North Dakota, do hereby quitclaim unto the said all right, title and interest in and to the following described premises," etc., is sufficient to convey title against the objection to the instrument that it does not designate a grantee. Said instrument sufficiently describes and identifies the grantee to sustain the conveyance. *Henniges v. Paschke*, 489.
4. Upon the equitable principle, that where one of two or more innocent persons must suffer for the wrongful act of a third, he must suffer who left it in the power of such third person to do the wrong. Purchasers of certain promissory notes secured by a real estate mortgage, by neglecting to take and place of record an assignment of the same, forfeited their rights under said mortgage as against the defendant who purchased the mortgaged premises in good faith and in reliance upon the record title. *Henniges v. Paschke*, 489.

DEEDS OF TRUST. See ASSIGNMENTS FOR BENEFIT OF CREDITORS, 520.

DEFAULT.

1. On motion to vacate judgment taken by default of answer, the moving papers must be accompanied by a verified answer and an affidavit of merits. *Emmons County v. Thompson*, 598.

DELIVERY. See CHATTEL MORTGAGES, 113; ASSIGNMENTS, 12.

1. To constitute a delivery there must be an intention to part with the control over the instrument and place it under the power of the grantee or some one for his use. *Erickson v. Kelly*, 12.

DEMURRER. See **PENALTIES**, 186. **PLEADING**, 306.

1. Where an action was brought in the name of the state against the defendant, a road overseer, to recover the statutory penalty for failure of defendant to destroy noxious weeds, a demurrer upon the ground that the plaintiff had no capacity to sue, sustained. *State v. Messner*, 186.
2. Where, in an action in behalf of minors by their guardian, the complaint did not set forth in issuable form facts to show his representative capacity and the character in which he sued, the objection was waived because not raised by demurrer for want of capacity to sue. *Dalrymple v. Security Loan & Trust Co.*, 306.

DEPOSITIONS. See **WITNESSES**, 175.

1. In a criminal case upon application for continuance to obtain the testimony of a non-resident witness it is incumbent upon the defendant to apply to the court or judge upon notice to the county attorney for the issuance of a commission out of and under the seal of the court to take such testimony. An application for continuance to obtain the testimony of a non-resident witness will not be granted except in connection with an application for a commission. *State v. Murphy*, 175.

DISBARMENT OF ATTORNEYS. See **ATTORNEYS**, 379.

1. In disbarment proceedings, the contents of affidavits which have been filed as a basis for commencing such proceedings cannot be considered as evidence in support of the accusations upon the trial of the issues of fact. The accused has a right to be tried upon the evidence of witnesses who have been cross-examined or an opportunity given to do so. *In re Simpson*, 379.
2. An attorney who receives money for his client and without the knowledge, consent or authority of such client, loans such money to a third person, for his own benefit, is guilty of embezzlement under section 7464, Rev. Codes, and such offense constitutes grounds for disbarment under subd. 1 of section 433, Rev. Codes. *In re Simpson*, 379.
3. Where an attorney settles an account upon which a suit is pending and receives payment on such settlement, and thereafter conceals from his client the fact that the money has been paid and account settled, and continues his prosecution of the case at his client's expense, such act is a deceit practiced upon a party to an action and is an express ground for disbarment under section 428, Rev. Codes. *In re Simpson*, 379.
4. Acts, violations of his duty as an attorney as laid down in subds. 2 and 6 of section 427, Rev. Codes, constitute grounds for disbarment under subd. 3 of section 433, Rev. Codes.
5. Rev. Codes, section 433, subd. 1, authorizes the disbarment of an attorney where he has committed a felony or a misdemeanor involving moral turpitude. Section 7604 makes it the duty of state's attorneys to diligently prosecute any and all persons violating the prohibitory liquor law, and constitutes the neglect of such duty a misdemeanor, punishable by both fine and imprisonment and forfeiture of office. *Held*, that where defendant, a prosecuting attorney, had knowingly failed to prosecute known violators of the liquor law, and had entered into an arrangement with them by which he received a bonus for refusing to prosecute, he was guilty of an offense involving moral turpitude and justifying his disbarment. *In re Simpson*, 379.

DISBARMENT OF ATTORNEYS—Continued.

6. Rev. Codes, section 428, provides that "an attorney at law who is guilty of deceit or collusion, or consents thereto with intent to deceive a party to an action or proceeding, is liable to be disbarred." *Held*, that where an attorney, during the pendency of an action on an account which he held for collection, settled the same and received payment, but concealed the fact from his client, and continued the prosecution of the case at his client's expense, such conduct constituted deceit within the Code, and was ground for disbarment. *In re Simpson*, 379.

DISMISSAL WITHOUT PREJUDICE. See PRACTICE, 239.

DISTRICT COURTS. See PRACTICE, 170.

1. A strict compliance with the statute is required to give the District Court jurisdiction upon appeals from justices of the peace. *Richardson v. Campbell*, 100.
2. In actions pending in the District Court in which the state's attorney is required to appear officially as counsel and which are important cases, the district judge has exclusive discretion under section 1988, Rev. Codes, to appoint special counsel to assist the state's attorney and in such cases the county commissioners are without authority to appoint special or additional counsel. *Storey v. Murphy*, 115.

DIVORCE.

1. The use of language by one party to the marriage contract such as would produce anger in the other is not alone sufficient to justify a divorce because of the infliction of grievous mental suffering. *Mahnken v. Mahnken*, 188.
2. In actions for divorce, where defendant's answer sets out causes of action for a divorce against the plaintiff in recrimination and as a defense to the plaintiff's cause of action, it is competent for the plaintiff to show at the trial that the cause of action pleaded in the answer have been condoned by the defendant. It is likewise competent for the defendant to show at the trial that the defendant, the forgiving party, has not since the condonation been treated with conjugal kindness by the plaintiff. If this fact is made to appear the condonation is ineffectual and the recrimination alleged in the answer may, despite the condonation, be shown to defeat the plaintiff's action. *Gardner v. Gardner*, 192.
3. In an action for divorce, where defendant's answer sets up causes of action against plaintiff, and the latter pleads condonation, defendant can show that since the condonation she has not been treated with conjugal kindness, which will defeat plaintiff's action. *Gardner v. Gardner*, 192.
4. In actions for divorce, where defendant's answer sets out causes of action for divorce against the plaintiff in recrimination, and as a defense to the plaintiff's causes of action, it is competent for the plaintiff to show, at the trial, that the causes of action pleaded in the answer have been condoned by the defendant. *Gardner v. Gardner*, 192.
5. The word "resident" as used in section 2755, Rev. Codes, is equivalent in meaning to the word "domicile." *Graham v. Graham*, 88.
6. A resident of another state cannot acquire a domicile in this state simply by coming within the state and remaining here physically for the requisite statutory period. To bodily presence within the state there must be added the present bona fide purpose of abiding here indefinitely as a home. *Graham v. Graham*, 88.

DIVORCE—Continued.

7. Under section 2739, Rev. Codes, a decree of divorce may be granted in this state by reason of the infliction of grievous mental suffering, although such suffering produce no bodily injury. *Mahnken v. Mahnken*, 188.
8. Whether or not, in any given case, grievous mental suffering has been inflicted upon the complaining party is purely a question of fact, to be determined from all the circumstances of the case, including the mental characteristics of the party complaining, so far as the same may be developed in the case. *Mahnken v. Mahnken*, 188.
9. Evidence that defendant constantly objected to expenditures by his wife, and frequently upbraided her therefor, although they were living in a house furnished with comfort and luxury and in keeping with his income, and that the abusive language of the defendant caused nervous sickness of plaintiff, which was not serious, and which did not interfere with her duties or interest in public affairs, is not such cruelty or grievous mental suffering as will furnish ground for divorce. *Mahnken v. Mahnken*, 188.

DOMESTIC RELATIONS. See DIVORCE, 188.

DOMICILE. See DIVORCE, 88; EXECUTORS AND ADMINISTRATORS, 441.

DUE PROCESS OF LAW. See CONSTITUTIONAL LAW, 1.

1. Tax deeds based upon an illegal assessment are void because to sustain such deeds would be to deprive the owner of his property without due process of law. *Sweigle v. Gates*, 538.

DURESS. See TAXATION, 346.

DUPLICITY. See CRIMINAL LAW, 353.

1. Where an information charged defendants with the crime of murder in the second degree, committed while they were engaged in the commission of a felony, defined by section 7177, Rev. Codes, relating to the producing of a miscarriage of a pregnant woman, the facts constituting the offense, defined in section 7177, were set out in the information. *Held*, that the information did not charge two distinct offenses and the demurrer thereto upon the ground of duplicity was properly overruled. *State v. Belyea*, 353.
2. Where averments in an information relating to a subordinate felony were properly and necessarily inserted in the information, as descriptive of the major offense, the information *held* not to be duplicitous. *State v. Belyea*, 353.

ELECTIONS. See INJUNCTIONS, 480.

1. Where a foreign-born person had been in this country for ten years, proved that he had taken out no naturalization papers in a county where he had lived for seven years, is no evidence that he was not a legal voter. *Kadlec v. Pavik*, 278.
2. Declarations of a party that he had voted, but had no citizen's papers, when confined to no time, place or election, are not admissible in evidence to show that he was not a qualified voter at a specified time and election. *Kadlec v. Pavik*, 278.
3. One political party cannot hold two separate conventions at the same time and nominate two different persons to fill one office. If two nominations for the same office by the same party are filed one or other must be spurious. *State v. Falley*, 450.

ELECTIONS—Continued.

4. It is the duty of the secretary of state to certify the genuine party nominee. *State v. Falley*, 450.
5. The secretary of state can institute no judicial inquiry to determine which of two or more nominations, all fair on their face, and all purporting to be the nomination of the same party for the same office, was in fact the regular nomination of said party. *State v. Falley*, 450.
6. Where the secretary of state refuses to certify the name of the person claiming to be the regular party nominee, he may be compelled to certify such name by the courts. *State v. Falley*, 450.
7. Under our statute, which gives the certifying officer no judicial powers, and which requires party nominations to be filed with the secretary of state, and which contemplates that no nominations shall be filed with him except those made by political parties, it becomes necessary that the courts should pass upon the regularity of nominations, otherwise the door for fraud and deception must stand wide open. *State v. Falley*, 450.
8. The Republican central committee of a judicial district has no power to dictate to the county committees and substitute its will for theirs, or to arrogate to itself the performance of the duties pertaining to the county committee. *State v. Falley*, 450.
9. The judicial central committee have no powers, except to preserve the district party organization and take the preliminary steps to insure the next succeeding convention; to fix the time and place, and basis of representation for such convention, and to so far pass upon the claims of contesting delegations as to say which, if either, shall participate in the preliminary organization. *State v. Falley*, 450.
10. The central or executive committee of the party has no function after one election is over, except to preserve the organization, take the necessary preliminary steps for the assembly of the next convention. It has no right to forestall in any manner or to limit or curtail the powers of the convention which it calls. *State v. Falley*, 450.
11. Where a county auditor refuses to receive and file the certificates of nominations for county officers made by a political party entitled to a column upon the official ballot, this refusal is a matter publici juris. It involves the right of the citizen to vote for the nominee of the political party of his faith, the exercise of the elective franchise, and indirectly the election of every candidate in that column upon the official ballot. The auditor in such case may be coerced by mandamus. *State v. Lavik*, 461.
12. Section 499, Rev. Codes, requires certificates of nomination to designate the particular office for which the person named in the certificate was nominated, and a certificate not complying with that provision cannot properly be filed by the secretary of state. *State v. Falley*, 464.
13. Section 503, Rev. Codes, requires certificates of nomination to be filed with the secretary of state not less than 30 days before election. A certificate filed 29 days before election cannot be legally filed by the secretary. The statute is mandatory. *State v. Falley*, 464.
14. The fact that the thirtieth day before the election fell on Sunday will not change this rule. Section 5127, Rev. Codes, relating to excluding holidays, has no application to a case of this kind. *State v. Falley*, 464.

ELECTIONS—Continued.

15. A political convention is the exclusive judge of the credentials and qualifications of persons claiming to be delegates thereto, and a minority of delegates, as thus determined by the convention, cannot, by withdrawing from said convention and joining themselves to the persons whose credentials have been rejected by the convention, constitute a legal party convention. *State v. Lavik*, 461.
16. Judicial tribunals cannot pass upon the correctness of parliamentary rulings or tactics adopted in a political convention. Such questions are purely political. Courts can determine in this behalf only whether or not an assembly is a political convention organized as the law requires. *State v. Lavik*, 461.

ELEVATOR COMPANIES. See TAXATION, 346; WAREHOUSEMEN, 213.

EMBEZZLEMENT.

1. An attorney who receives money for his client, and without the knowledge, consent or authority of such client, loans such money to a third person, for his own benefit, is guilty of embezzlement under section 7464, Rev. Codes. *In re Simpson*, 379.

EQUITY. See DEEDS, 489; REFORMATION OF INSTRUMENTS, 182.

1. Upon the equitable principle that where one of two or more innocent purchasers must suffer for the wrongful act of a third, he must suffer who left it in the power of such third person to do the wrong. *Held*, that plaintiffs, who are purchasers of certain promissory notes secured by real estate mortgage, by neglecting to take and place of record an assignment of the same, forfeited their rights under said mortgage as against the defendant who purchased the mortgaged premises in good faith, and in reliance upon the record title. *Henniges v. Paschke*, 489.

ESTATES OF DECEASED PERSONS. See EXECUTORS AND ADMINISTRATORS, 437.

1. A foreign executor may take ancillary probate upon property situated in this state. If there are legal claims or specific liens against personal property, or debts situated or owing in this state, these facts may necessitate the taking out of ancillary letters, and whenever this is done full responsibility on the part of an ancillary executor and his bondsmen attaches as to such debts and property; and this is true where there is real estate belonging to the deceased situated in this state, although foreign to the domicile of the deceased. *Joy v. Elton*, 428.

ESTOPPEL. See CORPORATIONS, 364; MISTAKE OF LAW, 268; EXECUTORS AND ADMINISTRATORS, 268.

1. Where a building and loan association, authorized to do business in another state, deposits securities with the state treasurer of such other state, to be held in trust for the benefit of stockholders and creditors, in compliance with the laws thereof, and receives its license from such state to transact business therein, and does so transact business for a number of years; neither it nor its shareholders, not residents of such other state, will be permitted on the subsequent insolvency of the association, to plead that the act of making such disposition of securities was ultra vires and void. *Clarke v. Olson*, 364.
2. Where a judgment creditor of the grantors, with an execution levy upon the land, brings an action in aid of such execution against the grantors and grantee, claiming that the conveyance was fraudulent

ESTOPPEL—Continued.

as to the creditors, and asking that it be set aside and the judgment be declared a lien upon the land, and where the defense of homestead, if it existed, was available to either and all of such defendants, and must have defeated a recovery by the plaintiff, but no such defense was interposed and the relief asked for was decreed, the fraudulent grantee cannot, in a subsequent action between himself and the assignee of the purchaser at the execution sale of the land on the judgment, but made after the entry of the decree, defeat such sale by setting up the homestead defense of which he failed to avail himself in the first instance. *Foogman v. Patterson*, 254.

3. An administrator, who, as such, and under the direction of the Probate Court, sells land which, under a mistake of law, in which the purchaser shares, is believed to belong to the estate, but which in fact does not, and executes an administrator's deed therefor, without personal covenants, is not estopped by such deed from asserting title in himself. *Gjerstadengen v. Hartzell*, 268.
4. The fact that an administrator sells his own land as that of the estate under a mistake, individually receives the entire proceeds, the same being allowed and paid upon a debt due him from the estate, does not estop him or his heirs from asserting title which was then unknown to him. *Gjerstadengen v. Hartzell*, 268.
5. It is essential to an estoppel that it shall appear that the party asserting the estoppel will suffer loss unless the holder of the title, of land sold under mistake of law, is prevented from asserting it. *Gjerstadengen v. Hartzell*, 268.
6. An order confirming sale of real estate on execution, after judgment, effects a substantial right and is appealable. Therefore, a party, aggrieved by the order of confirmation, having failed to appeal, was thereby precluded from attacking the judgment of confirmation on the ground of irregularities. *Dakota Inv. Co. v. Sullivan*, 303.
7. In an action to recover money paid under a mutual mistake of fact where the plaintiff at the time of the payment had the present means of ascertaining whether or not the fact existed, by negligence omitted to make the investigation, and on account of such negligence the defendant lost a valuable right, plaintiff was not permitted to recover. *Fegan v. Great Northern Ry. Co.*, 30.
8. A party may be estopped by his own negligence from claiming that money was paid under a mutual mistake of fact. *Fegan v. Great Northern Ry. Co.*, 30.

EVIDENCE. See BURDEN OF PROOF, 580, 262; DIVORCE, 192; NEGOTIABLE INSTRUMENTS, 536.

1. Where the entire control of the affairs of a corporation has been abandoned to one of its officers, it will be presumed that he is authorized by the corporation to do any act that the corporation might lawfully do, and the acts of such officer in transacting the business of the corporation need no authorization or ratification from the board of directors. *Tourtlot v. Whited*, 467.
2. Evidence examined and held sufficient to warrant the trial court in reforming a written contract by reason of mutual mistake. *Merchant v. Pielke*, 182.
3. In the trial of an action for conversion of property, witnesses who are personally familiar with the facts upon which the ownership of such property is based cannot testify directly to the ownership of the same as a fact. *Olson v. O'Connor*, 504.

EVIDENCE—Continued.

4. Ordinarily a statement as to the ownership of property is a statement of fact, and in such cases a direct answer is admissible from the witness. Where, however, it is a mixed question of law and fact and the witness has answered against the objection that the question calls for a conclusion, the error may be cured by disclosure of the facts upon which the conclusion is based, either in direct or cross-examination. *Olson v. O'Connor*, 504.
5. It is competent for a plaintiff in divorce, where the defendant has alleged causes for divorce in recrimination, to show that the alleged grounds of divorce have been condoned. *Gardner v. Gardner*, 192.
6. Mere possession of a negotiable promissory note, not payable to bearer and unindorsed by the payee, is not prima facie evidence of ownership of the note. *Shepard v. Hanson*, 249.
7. It is a legal presumption, until the contrary appears, that a court acted within its powers and in so doing considered all the evidence bearing upon the matter under investigation. *Joy v. Elton*, 428.
8. A written instrument is presumptive evidence of a consideration, and casts the burden of showing a want of consideration upon the parties seeking to invalidate or avoid it. *Dalrymple v. Security Loan & Trust Co.*, 306.
9. Where a party is shown to be an alien, such alienage is presumed to continue until some evidence to the contrary is produced, but proof that such party voted in this country overcomes the presumption of alienage, and raises a presumption of naturalization, as the law will not presume that the party committed an unlawful act. *Kadlec v. Pavik*, 278.
10. Where a foreign-born person who had been in this country for ten years, and had resided in one county in this state for seven years, proved that he had taken out no naturalization papers in that county, is not evidence that he was not a legal voter. *Kadlec v. Pavik*, 278.
11. Declarations of a party that he had voted, but had no citizen's papers, when confined to no time, place, or election, are not admissible in evidence to show that such party was not a qualified voter at a specified time and election. *Kadlec v. Pavik*, 278.
12. In an action on a bond with a large number of sureties, it appeared on the face of the instrument that one name had been signed as surety and subsequently erased, other names appeared below the erased signature. *Held*, that the bond was primarily admissible in evidence, that the legal presumption was that the erasure was innocent and not fraudulent in fact or law, and that the burden rested upon the other signers to show that their implied contract of contribution had been altered by the erasure. *Cass County v. American Exch. State Bank*, 263.
13. A party relying upon a written instrument has the burden of showing delivery. *Erickson v. Kelly*, 12.
14. The evidence in an action for specific performance disclosed that the land had doubled in value between the date of the contract and the date of commencing suit considered as bearing upon the question of delivery. *Erickson v. Kelly*, 12.
15. The law requires an executor to take possession of the property of deceased, within the state, and to inventory the same, and to file the inventory in the court granting him letters. It will be presumed in the absence of proof that the executor has performed his duty in this regard. *Joy v. Elton*, 428.

EVIDENCE—Continued.

16. The judgment of the County Court settling the final account of an executor is conclusive and not merely prima facie evidence of its contents. The same imports verity. Such judgment is construed in the same manner and with like intendments as the judgment of a court of general jurisdiction, and there is accorded like force, effect and legal presumptions to it as to the judgments and decrees of courts of general jurisdiction. *Joy v. Elton*, 428.
17. Evidence of a custom on the part of an insurance agent to extend credit for premiums was admissible in an action to recover damages for the breach of a parole agreement to renew a policy of insurance. *McCabe Bros. v. Aetna Ins. Co.*, 19.
18. Evidence that plaintiffs relied upon a preliminary agreement to renew a policy of insurance and that had they not believed that the policy was renewed they would have procured other insurance. *Held*, competent. *McCabe Bros. v. Aetna Ins. Co.*, 19.
19. The evidence considered and *held* sufficient to sustain a verdict of grand larceny. *State v. Rosencrans*, 163.
20. Recent possession of stolen property not satisfactorily explained is an evidential fact from which complicity in the larceny may be inferred. *State v. Rosencrans*, 163.
21. An information under the statutes of this state which accused the defendant of the crime of arson and charged facts constituting arson in the third degree is sufficiently specific as to the crime charged and does not accuse of one crime and state facts constituting a different crime. *State v. Young*, 165.
22. Plaintiff sued to recover damages for an alleged under delivery of flax. At the trial the jury was to determine from the evidence how much flax was actually delivered to plaintiff on the cars. The plaintiff saw some of the flax weighed into the cars but not all of it. Plaintiff was a witness and stated in figures the exact amount in net bushels of flax which was delivered and on cross-examination admitted that he predicated this statement upon the amount of the pay for the flax which was remitted to him by his agent at Duluth who sold it. The statement that he was paid for a certain net amount in bushels was frequently repeated by the witness. A motion to strike out the evidence, as to the amount of flax delivered, as hearsay, was denied. *Held*, error. *Kneeland v. Great Western Elev. Co.*, 49.

EXECUTIONS. See HOMESTEAD, 255; EXEMPTIONS, 255.

1. An order confirming an execution sale of real estate is in the nature of an adjudication, and cures all defects and irregularities in the proceedings, and cannot subsequently be attacked by motion in the case to set the same aside by reason of such defects and irregularities. *Dakota Inv. Co. v. Sullivan*, 303.
2. An order confirming an execution sale of real estate is a final and appealable order. *Dakota Inv. Co. v. Sullivan*, 303.

EXECUTORS AND ADMINISTRATORS.

1. McLaughlin having received original letters testamentary in a foreign state, in which the deceased was domiciled at death, and ancillary letters in this jurisdiction, in an action to recover a balance claimed due the estate from said executor, the only evidence of any such balance was a judgment entered by the County Court of Grand

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EXECUTORS AND ADMINISTRATORS—Continued.

Forks county upon an accounting made in said court by the executor. *Held*, that said judgment was conclusive as against collateral attack, except upon jurisdictional grounds, and those of collusion and fraud. *Joy v. Elton*, 428.

2. In an action upon an executor's bond the judgment settling his final account is conclusive as against the bondsmen as well as the executor, and as against the bondsmen imports verity, and is not merely prima facie evidence of its contents. Such judgment is not vulnerable to collateral attack upon jurisdictional grounds. *Joy v. Elton*, 428.
3. Where the same person is named in a will both as executor and trustee, and is by the terms of the will required to execute certain trusts created by the will, the two capacities—those of executor and trustee—are distinct and independent of each other. *Joy v. Elton*, 428.
4. An executor, after taking possession of assets belonging to the estate as executor, cannot relieve himself and his bondsmen, with respect to such assets, by his own mere mental operations. To be discharged from liability as executor, he must take some affirmative action of a character which is open and notorious, such as would be an accounting in the court from which he received his letters as executor, and a discharge as executor. *Joy v. Elton*, 428.
5. Sureties upon the bond given by an ancillary executor and for ancillary purposes are responsible only for the faithful conduct of the ancillary executor with the respect to duties assumed and property received by him pursuant to his legal appointment, and cannot be held for the misappropriation of funds brought from the domiciliary into the ancillary jurisdiction. *Joy v. Elton*, 428.
6. A foreign executor who has taken ancillary letters in this state for administration upon assets with a situs in this jurisdiction cannot, by a misappropriation of personal property found in this state and belonging to the estate of the deceased, or of debts collected in this state without suit, but while acting solely under the authority of letters testamentary, issued in another state by the court of original jurisdiction, bind his local securities for such defalcation. *Joy v. Elton*, 428.
7. The title of all personal property, wherever situated, belonging to the testator, vested by the will in the executor, and by virtue of his letters testamentary, the executor may reduce the personal property to possession and collect the debts. *Joy v. Elton*, 428.
8. It is the duty of an executor under his ancillary letters to take possession of and keep the property of the deceased found in the state of his ancillary appointment, and only the property located there; to file with the court which issued the ancillary letters a verified list of the property obtained by him under such letters, and no other property, and to file, when required, his final account, embracing a list of all property taken under his letters and containing also a verified statement of what disposition, if any, he had made of such property, and no other property can properly have place in such final accounting. *Joy v. Elton*, 428.
9. Where letters testamentary issued out of courts located in different jurisdictions, account must be taken of the schedules filed in both courts and particular attention should be paid to the original list of assets embraced in the executor's final account. After settlement and adjustment of the estate in the ancillary jurisdiction the

EXECUTORS AND ADMINISTRATORS—Continued.

- residue in the executor's hands should be transmitted to the domiciliary jurisdiction for distribution. *Joy v. Elton*, 428.
10. The County Court at a final accounting by an ancillary executor is vested with authority to consider only the subject matter of the property taken by the executor under the ancillary letters and to make a decree disposing of such property and none other. *Joy v. Elton*, 428.
 11. Where an executor is also a trustee under a will, he and his sureties upon his executor's bond will be bound until such time as the executor shall account as executor and qualify as trustee. *Joy v. Elton*, 428.
 12. The assets in the domiciliary jurisdiction must be accounted for there. The assets in the ancillary jurisdiction must be accounted for in the court making the ancillary appointment. Both courts do not have jurisdiction over the same specific property. *Joy v. Elton*, 428.
 13. An administrator who has misappropriated the estate cannot evade an accounting on the ground of the nullity of his appointment. *Dobler v. Strobel*, 104.
 14. Executors and administrators are not exempted by section 6258, Rev. Codes, from furnishing the cost bond on appeal from District Court required under section 6772, Rev. Codes. *Richardson v. Campbell*, 100.
 15. Under section 6405, Rev. Codes, 1899, a claim against an estate may be rejected by an administrator either by indorsing his written disallowance on such claim, or by neglecting or refusing to act thereon for a period of 10 days after it is presented, and in either case the rejection is, under such section, a rejection by the administrator. *Boyd v. Von Neida*, 337.
 16. Section 6407, Rev. Codes, provides that suit must be brought upon a rejected claim within three months after its rejection, otherwise it is forever barred. In an action upon a rejected claim the answer alleged that the claim was duly presented on July 1st, 1897, and that the same was not acted upon within 10 days thereafter, or at all, and that more than three months after such 10 day period had expired before suit was commenced, states a complete defense. *Boyd v. Von Neida*, 337.

EXEMPTIONS. See HOMESTEADS, 394; TAXATION, 68.

1. Where a debtor owns a section of land, a quarter section of which is exempt, but no homestead has been selected or homestead declaration filed, and where, on the levy of execution on the whole section under a judgment against the owner thereof, no claim of exemption is made, no presumption of law arises that the debtor claims as his homestead the particular quarter section upon which his dwelling house stands. *Foogman v. Patterson*, 254.
2. Where a debtor, owning a section of land, has not selected a homestead therein or filed a declaration, on levy on the entire section, the debtor, or some one authorized by law to make the claim for him, must claim some specific portion of the section as his homestead, or the homestead right will be waived. *Foogman v. Patterson*, 254.

FALSE PRETENSES. See CRIMINAL LAW, 409.

1. An indictment or information accusing defendant of obtaining money by false pretenses must contain an averment alleging the falsity of the pretense used as a means of obtaining the money or property. *State v. Stewart*, 409.

FALSE PRETENSES—Continued.

2. Where an indictment charged that defendant obtained money from the county by means of a certificate alleged to have been falsely made, forged and to be wholly fictitious, and the certificate was fully set forth in the indictment, and the indictment further charged "that in truth and in fact said partly printed and partly written paper was not a good and valid certificate of the facts therein recited, but the same was then and there a falsely made and forged certificate and wholly fictitious; all of which the said Robert H. Stewart then and there well knew." The false character of the certificate was sufficiently set up, and it was not necessary to expressly allege that it was not made by the person who purported to make it. *State v. Stewart*, 409.
3. A false pretense is such a fraudulent representation of an existing or past fact, by one who knows it not to be true, as is adapted to induce the person to whom it is made to part with something of value. *State v. Stewart*, 409.
4. A false token need only be adapted to induce another to part with his property. The essence of the crime is the obtaining of money or property by the aid of false pretenses. The pretense used to effect the fraud is not confined to written instruments of real or apparent legal effect, or to written instruments at all, but may be any false or fraudulent representation of past or existing facts, which are adapted to induce persons to whom made to part with something of value. *State v. Stewart*, 409.
5. The fact that investigation and exercise of ordinary prudence would have disclosed the falsity of the pretenses will not render them insufficient to support a conviction. It is not necessary that the pretense be such as to deceive a person of ordinary prudence if, in fact, it deceived the person defrauded. *State v. Stewart*, 409.
6. The question whether the false pretense was relied upon, and was the inducement by which property was obtained, is for the jury. *State v. Stewart*, 409.
7. Where the indictment charged the obtaining of money from a county, and the evidence disclosed that the false certificate was presented and delivered to the county auditor by the defendant, and a warrant received from that officer on the county treasurer, the indictment held sufficient as alleging the steps by which the defendant fraudulently obtained the money from the county. *State v. Stewart*, 409.

FINDINGS OF FACT. See PRACTICE, 239.

FIRES. See RAILROADS, 73; NEGLIGENCE, 134.

FORECLOSURE OF LIENS. See MECHANICS' LIENS, 140, 485; CONSTITUTIONAL LAW, 140; MORTGAGES, 224.

1. The purchaser of real estate at a mortgage foreclosure sale is entitled to receive from the tenant in possession the rents of the property sold, or the value of the use and occupation thereof, from the date of his purchase until redemption is made. *Whithed v. St. Anthony & Dakota Elev. Co.*, 224.

FOREIGN CORPORATIONS. See BUILDING AND LOAN ASSOCIATIONS, 364.

1. A foreign corporation which has not complied with sections 3261-3263, Rev. Codes, by filing a copy of its articles of incorporation in the office of the secretary of state and by appointing the secretary of state as its agent for the service of process, may nevertheless maintain an action in the courts of this state. *National Cash Register Co. v. Wilson*, 112.

FORGERY.

1. A written instrument, which shows upon its face that it neither creates nor purports to create any liability on the part of any one, is not the subject of forgery, unless extrinsic facts exist which give to it that character. *State v. Ryan*, 419.
2. An indictment for forging an instrument, which upon its face does not purport to create any liability, must allege the extrinsic facts which are relied upon to give such instrument validity as creating an obligation. *State v. Ryan*, 419.
3. The defendant is charged with the crime of forgery committed by uttering and publishing as true a falsely made and forged instrument, knowing the same to be false and forged, the same being a written certificate purporting to be made by a township clerk, reciting that 1,000 gopher tails had been presented to him by one Stewart, and that he had destroyed them. *Held*, that said certificate does not on its face either create, or purport to create, any liability, or create any right by which one may be affected, and, standing alone, is not the subject of forgery. *State v. Ryan*, 419.
4. The indictment sets out at length a resolution of the county commissioners offering a bounty, payable from the general county fund, for the destruction of gophers, and making provision for the payment thereof out of such fund upon the production of a certificate from a township clerk showing the facts of presentation, counting, and destruction. *Held*, that said resolution is entirely void, for the reason that it is not within the powers granted to county commissioners either by organic or statutory law to offer bounties from the general county fund. *Held*, further, that the pleading of such void resolution in the indictment does not give legal force and effect to the certificate of the township, which the defendant is accused of uttering, as creating or purporting to create any liability whereby any one may be affected. *State v. Ryan*, 419.
5. The allegations of the indictment examined, and found insufficient to charge the offense of uttering a forged instrument, for the reason that it appears upon the face of the indictment, by the extrinsic facts pleaded, that the instrument alleged to have been uttered by the accused neither created, nor purported to create, any liability. *State v. Ryan*, 419.
6. A forged instrument must be one which, if genuine, would create some right or liability; or, in other words, be of some legal effect. *State v. Stewart*, 409; *State v. Ryan*, 419.

FRAUD AND DECEIT. See DISBARMENT, 379; JUDGMENTS; ATTORNEYS, 379; CANCELLATION OF INSTRUMENTS, 28, 580; NEGOTIABLE INSTRUMENTS, 329.

1. Where an attorney settled an account upon which suit was pending and received payment on such settlement, but concealed from his client the fact that the money had been paid, and continued his prosecution of the case at his client's expense, he was *held* guilty of deceit practiced upon a party to an action, and disbarred. *In re Simpson*, 379.
2. The evidence to justify a court in setting aside a deed of real estate on the ground of fraud must be of a clear and satisfactory character. *Heyrock v. Surerus*, 28.
3. A judgment obtained by fraud may be collaterally attacked. *Joy v. Elton*, 428.

FRAUD AND DECEIT—Continued.

4. In a suit for fraudulent representations inducing the purchase of a promissory note, it is simply essential that the representations furnished the operative cause for the purchase, and it need not appear that the representations and the purchase concurred in point of time. *Chilson v. Houston*, 498.
5. In a suit for fraudulent representations inducing the purchase of a note, it is not essential that the purchaser return or offer to return the note sued on, his right of action not being dependent on a rescission of the contract, but on its affirmance. *Chilson v. Houston*, 498.
6. In an action for false representations as to the financial condition of the maker of a note inducing its purchase, the question whether the purchaser relied on the false statement, and was induced thereby to purchase the note, is a question of fact for the jury. *Chilson v. Houston*, 498.

FRAUDULENT CONVEYANCES. See HOMSTEADS, 504, 255; QUIETING TITLE, 306.

1. Though crops grown on the homestead owned by the husband are subject to his debts, the fact that a transfer of the homestead from the husband to the wife passes title to subsequent crops to her, does not make such transfer fraudulent as to the husband's creditors, since it merely passes title to the land, the subsequent crops having no value in law. *Olson v. O'Connor*, 504.
2. A fraudulent intent in the transfer of real estate must be made to appear in order to justify a court in setting the conveyance aside as fraudulent as to creditors. *Dalrymple v. Security Loan & Trust Co.*, 306.
3. That a father, on a consideration paid by him, caused a deed conveying real estate to be made to another in trust for the sole use and benefit of his children, and that the father was in debt at the time, and the creditors had obtained and docketed judgment against him, is insufficient, in the absence of allegations of the father's insolvency, or of a fraudulent intent on his part, to show that the deed was fraudulent. *Dalrymple v. Security Loan & Trust Co.*, 306.
4. Where the owner of real estate conveys the same to another party with intent to hinder, delay, or defraud his creditors, and for no consideration except the promise of such party to reconvey to the grantor on request, the transaction creates no trust relation between the parties thereto. Such fraudulent grantee may retain the legal and equitable title to the property as against all the world except the creditors of the grantor. *Lockren v. Rustan*, 43.
5. Where the owner of real estate conveys the same to another with intent to hinder, delay or defraud his creditors, and for no consideration except the promise of such party to reconvey to the grantor on request, under such circumstances a moral obligation of a high character rests upon the grantee to reconvey upon the request of the grantor, and such moral obligation furnishes a sufficient consideration to support such a reconveyance. *Lockren v. Rustan*, 43.
6. Such property, while in the hands of the grantee, would be subject to the claims of his creditors. But where no credit was given on the strength of the apparent ownership of such grantee, and where a reconveyance was made before any claims against the fraudulent grantee attached as liens upon the land, such reconveyance will be

FRAUDULENT CONVEYANCES—Continued.

upheld as against the creditors of such fraudulent grantee. *Lockren v. Rustan*, 43.

7. The fact that the original owner knew that the reconveyance was made by his fraudulent grantee with the intent, upon his part, to hinder, delay, or defraud his creditors, will not taint the transfer, where such original owner requested the same in order to protect and preserve his property. *Lockren v. Rustan*, 43.

GARNISHMENT. See JUSTICE OF THE PEACE, 204.**GUARDIAN AND WARD.**

1. Where an action is brought in behalf of minors by their guardian it is incumbent on the guardian to set out facts in an issuable form, in his complaint, to show his representative capacity and the character in which he sues. *Dalrymple v. Security Loan & Trust Co.*, 306.
2. The guardian cannot loan the money of his ward, lease his land or invest his funds without an order of court. Such transactions made without the order or direction of the Probate Court are invalid or voidable until approved by the proper court. *Shepard v. Hanson*, 249.
3. A guardian in making contracts relating to the estates of his wards can bind himself only, and can bind neither his wards personally nor their estate. *Shepard v. Hanson*, 249.

HIGHWAYS.

1. A recently established highway should not be vacated unless new facts have arisen since its establishment rendering it unnecessary or undesirable. *Miller v. Township of Oakwood*, 623.
2. Where, upon an appeal to the District Court from an order of the township board of supervisors vacating a highway, the undisputed testimony showed that such highway had very recently been established, and that the order of establishment had, upon appeal therefrom, been confirmed by the judgment of the District Court based upon the verdict of a jury, and that surrounding conditions had in no manner changed since the establishment of said highway in a manner to affect its utility, and that such highway, if undisturbed, would be used by the public, *held*, that the party appealing from said vacating order was entitled to a directed verdict in his favor. *Miller v. Township of Oakwood*, 623.

HOMESTEADS. See MECHANICS' LIENS, 57.

1. Where the head of a family owns a section of land, and his dwelling house stands upon one governmental quarter section thereof, he may select his homestead from any portion of such section that may best suit his convenience and interests, with the limitation that such selection must include the dwelling house and appurtenances, and must not exceed 160 acres in extent or \$5,000 in value. *Foogman v. Patterson*, 254.
2. Where no homestead has been selected or homestead declaration filed for record, as provided by law, upon the levy of execution upon the whole section under a judgment against the owner thereof, where no claim of exemption is made by the owner or a member of his family, no presumption of law arises that the debtor claims as his homestead the particular governmental quarter section upon which his dwelling house stands. *Foogman v. Patterson*, 254.

HOMESTEADS—Continued.

3. Where no homestead has been selected or homestead declaration filed, upon the levy of execution upon a section of land upon one quarter section of which the dwelling house stands, unless the debtor, or some one authorized by law to make the claim for him, claims some specific portion of the section as his homestead, the homestead right will be waived and a sale under the execution will pass the debtor's title. *Foogman v. Patterson*, 254.
4. A contract made with one who has a homestead filing upon land, will support a lien upon the building for materials used by such party in the construction of a house upon said land, for his own use, notwithstanding the fact that under section 2296, Statutes United States, the land could not be subjected to, or sold under, any such lien. *Gull River Lumber Co. v. Briggs*, 485.
5. Where a husband transferred the title of land to his wife to defraud creditors, and she knew the fact, the transfer was nevertheless valid because of the exemption of the homestead from sale on execution. *Olson v. O'Connor*, 504.

HOMICIDE. See **MURDER**, 504.

HUSBAND AND WIFE. See **DIVORCE**, 188.

1. The fact that a husband gratuitously devoted his time and skill to the management of his wife's land and the conduct of her farming operations do not operate to vest in him the title to the crops grown thereon. *Olson v. O'Connor*, 504.

INDEMNITY. See **COVENANTS**, 73; **TAXATION**, 131.

1. The sureties on an executor's bond are not mere indemnitors within the meaning of chapter 69 of the Civil Code, and need not be present and made parties to an accounting in the Probate Court. *Joy v. Elton*, 428.
2. A covenant for indemnity in the lease from the Northern Pacific Railway Company to defendants for all loss by fire sustained and enforced. *Northern Pacific Ry. Co. v. McClure*, 73.

INDICTMENT AND INFORMATION.

1. Form of indictment for forgery founded on section 7438, and on subdivision 2 of section 7430, Rev. Codes. *State v. Ryan*, 419.
2. An instrument to be the subject of indictment for forgery must either appear on its face to be, or be in fact, one which if true would possess some legal validity, so, if it does not appear on the face of the instrument set out in the indictment, facts must be averred which will enable the court to see that if it were genuine it would possess such validity. *State v. Ryan*, 419.
3. In framing an indictment or information it is necessary that the offense should be correctly named to give the defendants an opportunity to plead to the same. *State v. Belyea*, 353.
4. In charging a criminal offense it is necessary to describe the offense in language both direct and certain, and each of the facts constituting the offense. *State v. Belyea*, 353.
5. An indictment for murder in the second degree would be demurrable if the averment is omitted that the homicide was committed "without any design to effect death." *State v. Belyea*, 353.
6. An indictment for false pretenses sufficiently alleged that money was obtained from the county of Sargent by aid of such false pretenses, and was not open to the objection that it showed upon its face

INDICTMENT AND INFORMATION—Continued.

that the defendant obtained property, to-wit: a warrant for the money, by aid of such false pretense, instead of the money. *State v. Stewart*, 409.

7. An indictment set out at length a resolution of the county commissions, offering a bounty, payable from the general county fund, for the destruction of gophers, and making provision for the payment thereof out of such fund upon the production of a certificate from a township clerk showing the facts of presentation, counting and destruction, did not charge the crime of forgery. The resolution of the county commissioners is entirely void because not within the powers granted to county commissioners, and the pleading of such void resolution in the indictment does not give legal force and effect to the certificate, which the defendant is accused of uttering as creating or purporting to create any liability whereby any one may be affected. *State v. Ryan*, 419.
8. An indictment accused defendant of obtaining money from the county by means of a falsely made, forged and fictitious order, which was fully set forth, and further charged that said paper was not a good and valid certificate of the facts therein recited, and was wholly fictitious; all of which was known to the defendant. *Held*, that the indictment sufficiently charged the offense, and that it was not necessary to expressly allege that the certificate was not made by the person who purported to make it to give it the character of a false pretense. *State v. Stewart*, 409.
9. An indictment accusing defendant of obtaining money from Sargent county by aid of false pretenses, to-wit: a certain false certificate, also contained averments that the false certificate was presented and delivered to the county auditor by the defendant, and a warrant was received from that officer on the county treasurer. *Held*, that said indictment is good as against the objection; that the defendant did not receive money by aid of the false pretenses as charged, but received property, to-wit: the warrant of the auditor, as the county's money was obtained upon the warrant, issued by the auditor and paid by the treasurer as the county's agents, in reliance upon the false certificate presented by the defendant. *State v. Stewart*, 409.
10. All averments in an indictment relating to a subordinate felony, where properly and necessarily inserted in the indictment as descriptive of the major offense, and did not render the indictment bad for duplicity. *State v. Belyea*, 353.
11. The subordinate felony, defined by section 7177, Rev. Codes, of unlawfully procuring an abortion, is a stranger to and is not generically connected with the offense of murder in the second degree, and hence said subordinate offense is not necessarily included in the commission of the crime of murder in the second degree. *State v. Belyea*, 353.
12. In charging the offense defined by section 7177, Rev. Codes, it is improper to use the word "abortion" as interchangeable with the word "miscarriage." The term miscarriage as employed in this statute when construed with reference to section 7086, Rev. Codes, means the bringing forth of the foetus before it is capable of living. *State v. Belyea*, 353.
13. In an information for murder drawn upon section 7058, Rev. Codes, it is necessary for the information to contain an averment that the acts were committed "without any design to effect death." *State v. Belyea*, 353.

INDICTMENT AND INFORMATION—Continued.

14. In charging the felony defined by section 7058, Rev. Codes, the information should contain an averment that the homicide occurred while the defendants were engaged in the commission of a felony in order to fully cover the statutory definition of the offense. Following *State v. Emerich*, 87 Mo. 110. *State v. Belyea*, 353.
15. In charging murder in the second degree, it is improper to employ the term "malice aforethought" where the statute defining the offense uses the words "without design to effect death." *State v. Belyea*, 353.
16. It is essential in charging the offense defined in section 7177, Rev. Codes, to state that a miscarriage was not necessary to save the life of the woman who was operated upon. *State v. Belyea*, 353.
19. An information demurred to as duplicitous named as the offense charged against the defendants murder in the second degree. *Held*, that if the prosecution in framing the information contemplated a conviction for a minor felony, necessarily described in charging the offense of murder, but which information omitted to name the minor offense, *held* that the information did not sufficiently charge the minor offense to sustain a conviction thereof in that: it was not named in the information. *State v. Belyea*, 353.

INJUNCTIONS.

1. The Supreme Court, in the exercise of its original jurisdiction, can issue a writ of injunction only on an information therefor filed by the attorney general, or under his authority, and by leave of the court first obtained, and in the name of the state. *Anderson v. Gordon*, 480.
2. By section 5343, Rev. Codes, the writ of injunction as a provisional remedy is abolished and an injunction by order substituted. The injunction by order under this statute can only be made in a pending case. *Anderson v. Gordon*, 480.
3. It is the mandate of the constitution, section 87, that the Supreme Court shall use the writ of injunction in cases where that is the appropriate writ, in the same manner and by the same means employed in the use of prerogative writs with which it is grouped. *Anderson v. Gordon*, 480.
4. The right of a resident taxpayer to ask a court of equity to enjoin the unlawful disposition of public funds is not lost by mere laches in bringing the suit. *Storey v. Murphy*, 115.

INSURANCE.

1. Prepayment of premium for renewal term is not essential to the validity of a preliminary agreement to renew insurance. *McCabe Bros. v. Aetna Ins. Co.*, 19.
2. Section 3104, Rev. Codes, provides that no policy shall be issued by a mutual insurance company until a specified amount of insurance in a specified number of risks has been secured. Section 3090 declared that the insurance commissioner shall ascertain whether the company has complied with the requirements of the law before a certificate authorizing it to do business. *Held*, that as the securing of a specified number of applications was a condition precedent to the formation of the company, and a necessary legal step, it was not a violation of the statute prohibiting the doing of insurance business without such certificate, and hence an assessment levied on a policy issued pursuant to such an application could be enforced. *Montgomery v. Harker*, 527.

INSURANCE—Continued.

3. Where a member of a mutual insurance company has obligated himself to pay such annual assessments as shall be made, not to exceed a specified sum each year, and in anticipation of an annual assessment pays to the treasurer the amount of an annual assessment in advance, and such assessment is not in fact made, the sum so paid stands to his credit, and he has a right to apply the same on an assessment for a succeeding year. *Montgomery v. Harker*, 527.
4. A parol agreement to renew a policy of insurance, entered into by an agent having authority to renew policies, *held* to be the agreement of the principal, and not of the agent. *McCabe Bros. v. Aetna Ins. Co.*, 19.
5. An insurance agent, having authority to solicit insurance, to accept risks, to agree upon and settle the terms of insurance, and to issue and renew policies, has authority to make a preliminary parol contract binding upon his principal, to renew a policy about to expire. Certain provisions of the policy respecting renewals, waivers, etc., *held* not to apply to such preliminary contract. *McCabe Bros. v. Aetna Ins. Co.*, 19.
6. Evidence of custom on the part of the agent to extend credit for premiums *held* admissible. *McCabe Bros. v. Aetna Ins. Co.*, 19.
7. Evidence that plaintiffs relied upon the preliminary agreement to renew the policy, and that, had they not believed that the policy was renewed, they would have procured other insurance, also *held* competent. *McCabe Bros. v. Aetna Ins. Co.*, 19.

INSTRUCTIONS. See CRIMINAL LAW, 175, 405; CONTEMPT, 245; PRACTICE, 283.

1. A verbal error of the court in referring to the date of the offense as September 25, 1899, when the true date as charged was September 25, 1895, was harmless, where the erroneous reference could not operate to create confusion in the minds of the jurors as to the time of the commission of the offense, nor otherwise prejudice the defendant's rights. *State v. Murphy*, 175.
2. The practice of defining, or attempting to define, a reasonable doubt in instructions to a jury condemned. *State v. Montgomery*, 405.
3. Upon a trial of a charge of assault and battery committed by defendants while armed with a dangerous weapon, and with intent to do bodily harm, the jury were properly instructed, as follows: "An assault is any willful and unlawful attempt or offer, with force or violence, to do a corporal hurt to another. If you find in this case that there was an assault committed, but it was not made with a dangerous weapon, and was not made with any intent to do a bodily harm to the person of Kennedy, then it would be your duty to render a verdict of guilty of an assault." *State v. Montgomery*, 405.
4. The following instruction sustained in a criminal prosecution: "The burden of proof is upon the state to establish the guilt of the defendants to your satisfaction and beyond any reasonable doubt. You are the judges of all questions of fact in the case, including the credibility of the witnesses that have testified before you, and you must determine these questions under the rules of law as the court now gives them to you. The defendants are presumed to be innocent until the contrary conclusively appears by competent evidence introduced here in court. The jury starts out with the supposition, to begin with, that the defendants are innocent, unless

INSTRUCTIONS—Continued.

- the contrary has been established to your satisfaction beyond any reasonable doubt. A reasonable doubt, however, is not an imaginary doubt. It is not something which can be called up by some one who has a prejudice against the prosecution of the defendants, but it is a doubt that the reasonable man can present and explain." *State v. Montgomery*, 405.
5. It is the duty of the court where the charge as stated in the information included the other minor offense, legally inhering in the offense charged, to advise the jury that it is possible under the evidence in the case to find defendants, or one of them, guilty of the lesser offense included in the graver charge, instead of finding them guilty of the offense charged in the information. *State v. Montgomery*, 405.
 6. The following charge in a case of assault and battery, while armed with a dangerous weapon, with intent to do bodily harm, was sustained: "An assault is any willful and unlawful attempt, or effort, with force and violence, to do a corporal hurt to another. If you find in this case that there was an assault committed, but it was not made with a dangerous weapon, and was not made with any intent to do a bodily harm to the person of Kennedy, then it would be your duty to render a verdict of guilty of an assault." In other words, the court charges the jury that it is possible under the evidence in this case to find these defendants, or one of them, guilty of an assault as charged in the information, an assault to do bodily harm, providing you believe the witnesses for the prosecution. On the other hand, it is also possible in this case, if the jury accepts and believes the witnesses on the part of the prosecution, to find the defendants, or one of them, guilty of a simple assault. *State v. Montgomery*, 405.
 7. The following instruction *held* to be not prejudicial: "The burden of proof is upon the state to establish the guilt of the defendants to your satisfaction and beyond any reasonable doubt. You are the judges of all questions of fact in the case, including the credibility of the witnesses that have testified before you, and you must determine these questions under the rules of law as the court now gives them to you. The defendants are presumed to be innocent until the contrary conclusively appears by competent evidence introduced here in court. The jury start out with the supposition, to begin with, that the defendants are not guilty unless the contrary has been established satisfactorily to you," while open to criticism, does not constitute reversible error. *State v. Montgomery*, 405.
 8. In an action under the statute for bastardy it was proper for the trial court to advise the jury, in substance, that it was a matter of common knowledge that the shortest period of gestation was about 260 days. *State v. Peoples*, 146.
 9. A new trial will be granted where the instructions were not applicable under the evidence, and tended to mislead and confuse the jury, even though the instructions stated correct legal propositions. *Welter v. Lestikow*, 283.
 10. Error in permitting incompetent and hearsay evidence to be received may be cured by instructing the jury to disregard the same. *Kneeland v. Great Western Elev. Co.*, 49.
 11. If the defendant in a criminal case desires to have the jury instructed on any particular phase of the evidence, he must request the court to so instruct or error cannot be predicated upon the failure. *State v. Rosencrans*, 163.

INSTRUCTIONS—Continued.

12. In the instruction to the jury the court by inadvertance misstated the date upon which the offense was charged to have been committed. *Held*, under the facts of the case, that this error was without prejudice. *State v. Murphy*, 175.
13. Where the charge in a criminal case contains in one part an important correct legal proposition and in another an incorrect and conflicting proposition upon the same subject, the subject referred to being material to conviction, it is said, that the error is fatal for it is impossible to know upon which proposition the jury depended. *State v. Young*, 165.
14. In a criminal case, where the evidence was entirely circumstantial, the giving of the following instruction was *held* error, viz: "The law requires the jury to be satisfied of the defendant's guilt beyond a reasonable doubt, but in order to warrant a conviction does not require that you should be satisfied beyond a reasonable doubt of each link in the chain of circumstances relied upon to establish the defendant's guilt. It is sufficient, after taking the testimony altogether as a whole, you are satisfied beyond a reasonable doubt of the guilt of the defendant." *State v. Young*, 165.
15. In an action to recover damages for the breach of a contract to renew a policy of insurance an instruction to the jury that the action was to recover damages for the breach of the contract to insure was not misleading and prejudicial. *McCabe Bros. v. Aetna Ins. Co.*, 19.
16. The following instruction *held* to correctly state the law: "An insurance agent with power to make and effect insurance and to issue and deliver policies and to receive and collect premiums has the power, if no restriction on it is shown and brought home to the knowledge of the person dealing with him, to bind his company by a valuable contract with the assured at or prior to the expiration of the policy to renew the insurance and to waive the payment of the premium for the time being and to give the assured time for such payment." *McCabe Bros. v. Aetna Ins. Co.*, 19.
17. In an action to recover damages for the breach of a contract to renew a policy of insurance the following instruction is approved: "The tender of the premium by plaintiffs after the fire was sufficient if you find that there was an agreement to renew the policy." *McCabe Bros. v. Aetna Ins. Co.*, 27.

INTERLOCUTORY ORDERS. See APPAL AND ERROR, 575.

INTERPLEADER.

1. In proceedings by a telephone company to condemn a right of way over defendant's lands parallel with that of a railroad built thereon, and within the usual right of way of a railroad, it was not error to refuse to make the railroad company a party defendant, and to decide a collateral controversy between it and the other defendants arising out of alleged torts and trespasses committed by the railroad on the lands sought to be condemned, where the railroad company had never claimed any interest therein and could not claim damages for the condemnation of the telephone right of way. *Northwestern Tel. Exch. Co. v. Northern Pac. Ry Co.*, 339.
2. Under section 5238, Rev. Codes, the District Court is required to determine any controversy between the original parties to an action, without interpleading other parties, whenever such controversy can be determined without prejudicing the rights of such other parties or of the parties to the record. *Northwestern Tel. Exch. Co. v. Northern Pac. Ry. Co.*, 339.

INTOXICATING LIQUORS.

1. Sections 7594, 7596 and 7597, Rev. Codes, provide that it shall be unlawful for any person to sell liquor for medicinal purposes without obtaining a druggist permit and prescribe the conditions governing the sale of liquor by licensed druggists and fix penalties for wrongful sales. Section 7605 declares that all places where intoxicating liquors are sold, or given away, contrary to the provisions of the act shall constitute a nuisance, and be subject to abatement. *Held*, that where a licensed pharmacist holding a druggist's permit sold intoxicating liquors as a beverage, and not for medicinal purposes, the court had jurisdiction of an action against him to abate a nuisance under section 7605, and special provisions in sections 7594-7597, relating to druggists. *State v. McGruer*, 566.

INVENTORY AND APPRAISEMENT. See COUNTY COURTS, 443; ESTATES OF DECEASED PERSONS, 443.

1. An ancillary executor must file in the County Court appointing him a full inventory of all property within the state of his ancillary appointment. *Joy v. Elton*, 428.

JUDGMENTS. See LIMITATION OF ACTIONS, 1.

1. A cause of action on a judgment accrues when the judgment is rendered. *Osborne v. Lindstrom*, 1.
2. The commencement of an action on judgment is not stayed while the judgment creditor is obtaining leave of court to sue thereon. *Osborne v. Lindstrom*, 1.
3. The time limited within which an action may be brought upon a judgment, Rev. Codes, section 5200, applies to judgments rendered before its enactment as well as those subsequently entered, and when the limitation had begun to run prior to its enactment, the time which had run constituted a part of the limitation period under such section. *Osborne v. Lindstrom*, 1.
4. A judgment rendered and entered after the denial of a motion to strike from the calendar when the case was improperly on the calendar should be vacated as irregularly rendered. *Oswald v. Moran*, 170.
5. A judgment dismissing an action cannot be entered on an objection to the introduction of evidence because the complaint does not state facts sufficient to constitute a cause of action, but a formal motion for judgment must be made. *James River Nat. Bank v. Purchase*, 280.
6. The adjudication of the County Court settling the account of an executor is a final judgment, and so long as it remains unappealed from is final and imports absolute verity. *Joy v. Elton*, 428.
7. A judgment entered by a County Court of this state in any matter within its jurisdiction is of equal rank and dignity with other judgments entered by courts of general jurisdiction. Such judgments can be collaterally attacked only upon jurisdictional grounds and upon those of collusion or fraud. *Joy v. Elton*, 428.
8. The surety on an administrator's bond is concluded by and cannot attack collaterally a final judgment from which there has been no appeal. *Joy v. Elton*, 428.
9. A surety is not precluded from attacking collaterally a final judgment upon the ground of fraud and collusion. *Joy v. Elton*, 428.
10. The judgments of the County Court import verity and are conclusive upon parties and their privies. *Joy v. Elton*, 428.

JUDGMENTS—Continued.

11. Where a judgment creditor of grantors, after execution levy, brings an action in aid of such execution against the grantors and grantee, claiming that the conveyance was fraudulent, and asking that the judgment be declared a lien on the land, and where the defense of homestead was available to defendants, and would have defeated a recovery by the plaintiff, but no such defense was interposed, and the relief asked was decreed, the fraudulent grantee cannot, in a subsequent action between himself and the assignee of the purchaser at an execution sale of the land on the judgment, but made after the entry of the decree, defeat such sale by setting up the homestead defense. *Foogman v. Patterson*, 254.
12. While it is proper in rendering judgment to state the grounds on which the court acted, it is error for the court to state the extent to which the judgment may or may not prejudice the rights of the plaintiff in prosecuting other actions between the parties. *Prondzinski v. Garbutt*, 239.
13. It was proper to vacate a judgment entered where no findings of fact or law were made or filed, and findings were not waived; such judgment being irregular and without authority of law. *Prondzinski v. Garbutt*, 239.
14. Where, after judgment was vacated because rendered without findings of fact or law, the court filed such findings, it was not error to enter judgment thereon. *Prondzinski v. Garbutt*, 239.

JURISDICTION. See JUSTICES OF THE PEACE, 40, 204; EXECUTORS AND ADMINISTRATORS, 428; TAXATION, 538.

1. A justice of the peace does not obtain jurisdiction of a defendant by the service of a summons upon him in another county from that within which he resides. *Searl v. Shanks*, 204.
2. The Supreme Court has jurisdiction to cause writs of injunction to issue, but the same are quasi prerogative writs and will only issue upon an information filed by the attorney general, or under his authority, and by leave of court first obtained, and in the name of the state. *Anderson v. Gordon*, 480.

JUSTICES OF THE PEACE.

1. Under section 6705, Rev. Codes, in actions before a justice of the peace a judgment dismissing the action should be rendered where the plaintiff fails to appear at the time specified in the summons or to which the action has been postponed or within one hour thereafter. Plaintiff in this case failed to appear and defendant having appeared moved to dismiss, the justice without ruling on the motion adjourned the case. *Held*, that the failure to grant the motion was error and ousted the justice of further jurisdiction. *Plano Mig. Co. v. Stokke*, 40.
2. Section 6258, Rev. Codes, providing that executors, administrators and creditors may appeal from the decrees and orders without giving an appeal bond, applies only to appeals from County to District Courts, and does not exempt them from giving the cost bond required by section 6772, Rev. Codes, upon all appeals from judgments rendered in District Courts. *Richardson v. Campbell*, 100.
3. A justice of the peace who, after the trial of a case has been concluded and the parties have rested, adjourns the case indefinitely, by such act of adjournment loses jurisdiction thereafter to render and enter judgment, and a judgment so entered is void unless jurisdiction has in some manner been restored. *Sluga v. Walker*, 108.

JUSTICES OF THE PEACE—Continued.

4. On appeal from Justice to District Court service of the statutory undertaking is necessary to the jurisdiction of the District Court, and in case of failure to serve such undertaking the District Court is without jurisdiction to grant leave to the appellant to serve and file a new undertaking. *Richardson v. Campbell*, 100.
5. The service of a notice of appeal upon the adverse party and the filing of the same with an undertaking with the clerk of the District Court within thirty days from the rendition of the judgment appealed from, also the service of the statutory undertaking, are necessary to the District Courts acquiring jurisdiction upon the appeal. *Richardson v. Campbell*, 100.
6. Under sections 6771, 6772 and 6776, Rev. Codes, service of notice of appeal and filing same with bond with clerk of District Court is insufficient without service of statutory undertaking also. *Richardson v. Campbell*, 100.
7. Section 6705, Rev. Codes, provides that in actions before a justice of the peace a judgment dismissing the action shall be rendered where the plaintiff fails to appear at the time specified in the summons or to which the action had been postponed or within one hour thereafter. Plaintiff failed to so appear and defendant having appeared, moved to dismiss. The justice without ruling on the motion adjourned the case. *Held*, that the failure to grant the motion was error and ousted the justice of further jurisdiction. *Plano Mfg. Co. v. Stokke*, 40.
8. There is nothing in the garnishment statute, as found in Rev. Codes, 1895, sections 5382-5402, or in chapter 82, Laws 1897, repealing or modifying the provisions of sections 6640, 6641, Rev. Codes, which sections regulate the service of a summons upon the defendant in an action properly instituted in Justice Court. *Searl v. Shanks*, 204.
9. There is no provision of the law which authorizes a justice of the peace in an ordinary action to issue a second summons in a case where the first summons fails to be served in time, nor does the right to do so exist in a case where a garnishment action has been instituted as ancillary to an ordinary action in Justice Court. *Searl v. Shanks*, 204.
10. In an action commenced in Justice's Court in the county of Cass to recover money only, the summons in the action proper was served upon the defendant in the county of Traill, defendant appearing specially, moved in the Justice's Court upon the return day to dismiss the action for want of jurisdiction over the person of defendant, and the motion was granted. *Held*, that the action was properly dismissed, inasmuch as the action was not one in which service of a summons could be made outside of the county of the justice. *Searls v. Shanks*, 204.

LACHES. See INJUNCTION, 115; REMAND OF RECORD, 552.

1. Where a judgment creditor of the grantors, with an execution levied upon the land, brings an action in aid of such execution against the grantors and the grantee, claiming that the conveyance was fraudulent as to creditors, and asking that it be set aside and the judgment declared a lien upon the land, and where the defense of homestead, if it existed, was available to either and all of such defendants, and must have defeated a recovery by the plaintiff, but no such defense was interposed, and the relief asked was decreed, the fraudulent grantee cannot, in a subsequent action between himself and the assignee of the purchaser at an execution sale of the land on the judgment, but made after the entry of the decree, defeat such sale by setting up the homestead defense, of which he failed to avail himself in the first instance. *Foogman v. Patterson*, 255.

LANDLORD AND TENANT. See **COVENANTS, 73; VENDOR AND PURCHASER, 224.**

1. The Northern Pacific Railway Company leased a portion of its right of way to the defendants for warehouse purposes. The defendants covenanted in the lease that in addition to paying a nominal rent, they would hold the lessor harmless from losses arising out of the destruction of property on the leased premises by fires set by the lessor's engines. Said lease contained a stipulation that all of its covenants and conditions should be binding upon the assigns of both parties to it. The company afterwards transferred all of its property, including the premises demised and the lease, to plaintiff. The lessees consented to such transfer and attorned to the plaintiff as their landlord under said lease. *Held*, in an action by plaintiff to recover the amount of the loss suffered by it as a result of a fire set by its engines, that the covenant to save harmless passed to plaintiff, and it is accordingly entitled to recover thereon. *Northern Pac. Ry. Co. v. McClure, 73.*

LARCENY.

1. The recent personal possession of stolen property not satisfactorily explained constitutes an evidential fact from which complicity in the larceny may be inferred. *State v. Rosencrans, 163.*
2. Evidence of the possession of stolen property, which consisted of a mower and two hay rakes, within ten days after it was stolen and at his home, sixteen miles from the place where stolen, is, in connection with the other evidence in the case, sufficient to uphold the verdict of the jury finding defendant guilty of larceny. *State v. Rosencrans, 163.*

LIENS. See **MECHANICS' LIENS, 140; MORTGAGES, 140.**

LIMITATION OF ACTIONS. See **EXECUTORS AND ADMINISTRATORS, 337; TAXATION, 538; APPEAL AND ERROR, 458.**

1. A suit upon a rejected claim must be brought within three months after its rejection, otherwise it is barred forever under section 6407, *Rev. Codes.* *Boyd v. Von Neida, 337.*
2. Where tax deeds are voidable for jurisdictional reasons, as for the non-assessment of lots described in the same, they do not start the statute of limitations running. *Sweigle v. Gates, 538.*
3. Section 5200, *Rev. Codes*, which limits the time in which actions may be brought upon judgments, applies to judgments that had been rendered prior to the enactment of that section, as well as to judgments subsequently entered; and such statute does not operate upon existing causes of action from the date of the statute only, but, whenever the old statute of limitations had begun to run against a cause of action prior to the enactment of section 5200, the time so run constitutes a part of the limitation period declared by said section. *Osborne v. Lindstrom, 1.*
4. A cause of action upon a judgment accrues when the judgment is rendered, and not when leave to sue thereon is obtained from the court. *Osborne v. Lindstrom, 1.*
5. The commencement of an action on a judgment is not stayed within the meaning of section 5215, *Rev. Codes*, during the time the judgment creditor is required to obtain leave of court in order to bring suit thereon. *Osborne v. Lindstrom, 1.*

LIMITATION OF ACTIONS—Continued.

6. In all cases when the legislature shortens a statutory period of limitation, and makes the amended law apply to existing causes of action, it must fix a time within which action may be brought upon existing causes of action that would otherwise be barred by the amended law, and, if the time so fixed is so short that it amounts to a practical denial of an opportunity to sue, courts will declare the time unreasonable, and the act unconstitutional, on the ground that it deprives the party of his property without due process of law. *Osborne v. Lindstrom*, 1.
7. The power of the courts is limited to passing upon the acts of the legislature, and, if the legislature has failed to act, courts cannot supply the lapse. Fixing the time within which to bring an action is purely a legislative function. In so far as the language of the case of *Bank v. Braithwaite*, 7 N. D. 358, 75 N. W. Rep. 244, conflicts with these views, it is disapproved. *Osborne v. Lindstrom*, 1.
8. The time between the date of the passage of an act and the date at which it takes effect will be considered by the courts in passing upon the question as to whether reasonable time had been given in which to bring suit. In such cases, the courts hold that, in postponing the date at which the law should take effect, the courts intended that the intervening time should be given in which to assert rights. *Osborne v. Lindstrom*, 1.
9. The limitation fixed by the legislature may depend upon the happening of a subsequent event, provided such subsequent event cannot possibly happen until after the expiration of a reasonable time in which to bring actions on existing causes of action that would otherwise be barred. *Osborne v. Lindstrom*, 1.
10. Chapter 74, Laws 1893, fixed in advance a reasonable time within which actions might be brought on existing causes of action that would otherwise be absolutely barred, under the terms of section 5200, Rev. Codes. *Osborne v. Lindstrom*, 1.

MANDAMUS.

1. Mandamus will not lie to compel the secretary of state to certify nominations for office not filed in his office 30 days before election. *State ex rel Anderson v. Falley*, 464.
2. A certificate of nomination failed to designate the particular office for which the person named in the certificate was nominated. *Held*, therefore, that the certificate could not be filed by the secretary of state, and he could not be compelled to certify the nomination by Mandamus. *State ex rel Anderson v. Falley*, 464.
3. The Supreme Court will issue an original writ of mandamus to compel a county auditor to file the certificates of nominations for county officers made by a political party entitled to a column upon the official ballot where the auditor has refused to receive and file the same. *State ex rel Fosser v. Lavik*, 461.
4. Mandamus is the proper remedy to compel the secretary of state to certify to the proper county officer the names of all persons whose nominations for office have been filed with him. *State ex rel Wolfe v. Falley*, 450.
5. Mandamus will lie to compel the secretary of state to certify to the proper county auditors the names of nominees of a party convention. *State v. Falley*, 450; *State v. Lavik*, 461; *State v. Falley*, 464.

MANDAMUS—Continued.

6. In a mandamus proceeding on the part of a stockholder to compel the secretary of the corporation to permit him to inspect the books and records of the corporation, method of procedure discussed but not decided. *Mooney v. Donovan*, 93.
7. Whether mandamus proceedings come within the provisions of chapter 5, Laws 1897, relating to the trial of civil actions by the court, not decided. *Mooney v. Donovan*, 93.
8. An order denying a motion to quash an alternative writ of mandamus forms no part of the judgment roll unless made so by the statement of the case under section 5489, Comp. Laws. Before an order of the court can become a part of the judgment roll without being made so by a statement of the case it must be an order involving the merits and necessarily affecting the judgment. *Mooney v. Donovan*, 93.

MECHANICS' LIENS.

1. To entitle a party to foreclose a mechanic's lien upon a building only, and sell the same separate and apart from the land upon which it stands, it is necessary, under the present mechanic's lien law of this state, that the complaint should show either that the building was erected by one who had a leasehold interest in the land whereon the building is situated, and that the lease has become forfeited, or that there were existing liens upon the land at the time the materials were furnished, or labor done, for which the lien is claimed. *Gull River Lumber Co. v. Briggs*, 485.
2. The provision found in section 4795, Rev. Codes, giving a court authority, under conditions stated therein, to order real estate to be sold, and proceeds to be divided between the mortgagee, who had the first lien upon the land, and the mechanic's lien holder, who had a first lien upon the building, does not impair the obligations of the mortgage existing upon said land before the building was erected, and before the law was passed. *Craig v. Herzman*, 140.
3. Such provision, as it relates to procedure only, may be applied in any case tried after its enactment, although the cause of action arose before the enactment. The rule requiring statutes to be given prospective operation only does not apply to statutes relating to procedure. *Craig v. Herzman*, 140.
4. The repeal of the mechanic's lien law, as it existed in the Compiled Laws, by the enactment of the Revised Codes, did not operate to extinguish liens that had been acquired under the prior law. Where a mechanic's lien has attached under the law in force at that time, the holder's right thereto becomes vested, and cannot be destroyed by the repeal of the law. *Craig v. Herzman*, 140.
5. Rights under a mechanic's lien law are fixed by the law in force when the contract is made, and the labor or materials furnished, and the lien statement filed; and if subsequently the law is changed the rights thus acquired cannot be affected, but they will be enforced under the provisions of the law in force when the action to foreclose the lien is brought. *Mahon v. Surerus*, 57.
6. Under the mechanic's lien law, as it stood in the Compiled Laws of 1887, a party who, under contract with one who resided upon land upon which he had made a homestead filing, but had not made final proof thereon, furnished lumber to be used, and which in fact was used, in the erection of the dwelling house upon said land, for the use of the party residing thereon, was entitled to a lien upon such house for the value of the materials so furnished, and to have such

MECHANICS' LIENS—Continued.

house sold to satisfy such lien, and removed from such land. *Mahon v. Surerus*, 57.

7. The party residing upon land upon which a homestead filing had been made, but no final proof thereon, and for whose immediate use the house was built, is the owner of the land under the terms of Comp. Laws, section 5483, providing that every person for whose immediate use and benefit a building or other improvement is made shall be deemed the owner of the land within the meaning of the mechanic's lien law. *Mahon v. Surerus*, 57.
8. The sale and removal on foreclosure of mechanic's lien of the house erected on land on which a homestead filing had been made, but no final proof thereon, in no way conflicts with Rev. Statutes of the United States, section 2296, which in substance declares that land acquired under the homestead act shall not be sold for any debt contracted before the issuance of the patent therefor. *Mahon v. Surerus*, 57.

MISCARRIAGE.

1. It is essential in charging the offense defined in section 7177, Rev. Codes, to state that a miscarriage was not necessary to save the life of the woman who was operated upon. *State v. Belyea*, 353.
2. The terms miscarriage and abortion are not interchangeable terms within the meaning of the penal code of this state. Miscarriage means the bringing forth of the foetus before it is capable of living. *State v. Belyea*, 353.
3. Under section 7177, Rev. Codes, if drugs are prescribed or administered to a pregnant woman, or if such woman is advised to take any drug or substance, or if instruments are used upon such woman, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, the offense of unlawfully procuring a miscarriage is committed. *State v. Belyea*, 353.
4. In an indictment for the violation of section 7177, Rev. Codes, it is improper to use the words "maliciously, willfully and of their malice aforethought." These words import a correctly described and deliberate homicide. They constitute the best possible description of motive in the crime of murder in the first degree, but are not proper in charging an unlawful procuring of the miscarriage. *State v. Belyea*, 353.

MISTAKE. See REFORMATION OF INSTRUMENTS, 182; ESTOPPEL, 268.

1. In an action to recover money paid under a mutual mistake of fact plaintiff cannot recover if he had in his hands at the time of payment the present means of ascertaining whether or not the fact in question existed, but by negligence omitted to make the investigation which would have disclosed the fact in question, and where the other party has lost a valuable right thereby no recovery can be had. *Fegan v. Great Northern Ry. Co.*, 30.

MORTGAGES. See FORECLOSURE, 290; CONTRACTS, 559; BUILDING AND LOAN ASSOCIATIONS, 364.

1. A notice of mortgage foreclosure sale, by advertisement, which was published forty days and no longer, such publication being first made on January 14th. and the sale being made February 23rd, was legally published under section 5848, Rev. Codes. *McDonald v. Nordyke Marmon Co.*, 290.

MORTGAGES—Continued.

2. Under section 5848, Rev. Codes, notices are required to be published six times, once in each week, for six successive weeks. When these provisions are complied with there will be no occasion to consider periods of time, whether computed by days or weeks. *Finlayson v. Peterson*, 5 N. D. 587, construing Comp. Laws, section 5414, distinguished. *McDonald v. Nordyke Marmon Co.*, 290.
3. Rev. Codes, section 4795, giving a court authority, under conditions stated therein, to order real estate to be sold, and the proceeds to be divided between the mortgagee who had the first lien upon the land and a mechanic's lien holder who had a first lien upon the building, as it relates to procedure only, may be applied in any case tried after its enactment, although the cause of action arose before the enactment. The rule requiring statutes to be given prospective operation only does not apply to statutes relating to procedure. *Craig v. Herzman*, 140.
4. The provision found in section 4795, Rev. Codes, giving a court authority under conditions stated therein to order real estate to be sold and the proceeds to be divided between the mortgagee, who had the first lien upon the land, and a mechanic's lien holder who had a first lien upon the building, does not impair the obligation of the mortgage existing upon said land before the building was erected and before the law was passed. *Craig v. Herzman*, 140.
5. A mortgage which expressly recites that it is given to secure the prompt payment of rent according to the terms of a certain written lease, and names the amount secured, which amount corresponds with the amount agreed in the lease to be paid as rent, does not secure rents which become due after the expiration of such lease under a tenancy arising by implication of law from holding over after such lease expired. *Fields v. Mott*, 621.
6. A purchaser of real estate at a mortgage foreclosure sale is entitled to receive from the tenant in possession the rents of the property sold, or the value of the use and occupation thereof, from the date of his purchase until redemption is made, under section 5549, Rev. Codes. *Held*, under the foregoing section of the statute, that where farm lands, which are being operated under a contract with the owner which reserves the title and possession of a fixed portion of the grain grown thereon in the owner, as compensation for its use, are sold at foreclosure sale, the purchaser thereof at such sale is entitled to such share as falls during such redemption period, and has the same rights thereto as the owner of the land had, and may invoke the same remedies to enforce them. *Whithed v. St. Anthony & Dakota Elev. Co.*, 224.

MOTION TO STRIKE CASE FROM CALENDAR. See **PRACTICE**, 170.

MUNICIPAL CORPORATIONS. See **COUNTIES**, 425.

1. In exercising the power of local assessment, the legislature is not limited to the actual increase in value of the property assessed, resulting from the local improvement. *Webster v. City of Fargo*, 208.
2. A legislative enactment which charges the entire cost of paving the streets of a city against the property abutting the paving and in proportion to frontage, is not in contravention of the 14th amendment to the Federal Constitution. *Webster v. City of Fargo*, 208.

MURDER.

1. The information charged, or attempted to charge, the defendant with the crime of murder in the second degree committed by the defendant while he was engaged in the commission of the felony defined by section 7177, Rev. Codes, relating to the crime of producing or attempting to procure the miscarriage of a woman pregnant with child. The facts constituting the offense defined in section 7177 were set out in the information. *Held*, that the information did not charge two distinct and independent offenses, and hence the demurrer thereto upon the ground of duplicity was properly overruled. *State v. Belyea*, 353.
2. All averments in the information relating to the subordinate felony were properly and necessarily inserted in the information as descriptive of the major offense, that of murder in the second degree. *State v. Belyea*, 353.
3. The subordinate felony defined by section 7177, Rev. Codes, is foreign to, and is not generically connected with, the offense of murder in the second degree, and hence said subordinate offense is not necessarily included in the commission of the crime of murder in the second degree, as defined by subdivision 3, section 7058, Rev. Codes. *State v. Belyea*, 353.
4. The jury returned the following verdict in response to certain instructions given to them by the trial court, and pursuant to a form of verdict furnished the jury by said court: "We, the jury, find the defendant E. H. Belyea guilty of the crime of unlawfully procuring an abortion, as charged in the information." *Held*, that such verdict was illegal, and wholly unauthorized, in a case where the information charged the crime of murder in the second degree perpetrated while defendant was engaged in the commission of an independent felony. *Held*, further, that the verdict erroneously assumed that the offense referred to in the verdict was necessarily committed in the commission of the offense of murder in the second degree. *State v. Belyea*, 353.
5. An information charging murder under subd. 3, section 7058, Rev. Codes, should use the statutory language or its equivalent, viz: "without design to effect death." *State v. Belyea*, 353.
6. In an information charging murder in the second degree or manslaughter in any degree, the words "malice aforethought," "premeditated design," "willfully," "maliciously," and similar expressions should not be employed. These expressions are only appropriate in an accusation for murder in the first degree and indicate deliberation or motive. *State v. Belyea*, 353.
7. An indictment or information accusing one of murder while engaged in committing the felony described in section 7177, Rev. Codes, should contain an averment that "miscarriage was not necessary to save the life of the woman who was operated upon." *State v. Belyea*, 353.
8. In an indictment for murder, under section 7086, Rev. Codes, the information must disclose that the woman was pregnant with a quick child. *State v. Belyea*, 353.

NATIONAL BANKS. See BANKS AND BANKING, 467. USURY, 60.

NATURALIZATION. See VOTERS, 276.

NEGLIGENCE. See **ESTOPPEL**, 30; **PAYMENT**, 30; **RAILROADS**, 73; **INDEMNITY**, 73.

1. Ordinarily, in an action to recover damages for negligence, the question whether the acts complained of constitute negligence is for the the jury. This is not the case, however, when it is apparent that fair-minded men would not infer negligence from the facts proved. *Owen v. Cook*, 134.
2. A person whose property is threatened with imminent destruction by fire may take such steps for its protection as are resonable and proper, if his acts aid or contribute to the destruction of another's property, he will not be liable as for its negligent destruction. The fire from which, without negligence, he seeks to protect himself, will be considered as the direct and proximate cause of the loss, and also the cause of his acts. *Owen v. Cook*, 134.
3. The defendants, when on a hunting expedition, encamped in a vacant house which was situated in an open prairie. A prairie fire originated near the house, and threatened its destruction and the destruction of defendants' property. A back fire was set by them near the house, and allowed to run until it joined the main fire, which destroyed the property of plaintiff's intestate. *Held*, under the facts stated in the opinion, that the original fire was the proximate cause of the loss, and that the acts of the defendants in back-firing were not negligent, and are wholly insufficient to sustain a verdict for the plaintiff for the negligent destruction of the property. *Owen v. Cook*, 134.

NEGOTIABLE INSTRUMENTS. See **BUILDING AND LOAN ASSOCIATIONS**, 364; **BURDEN OF PROOF**, 329; **EVIDENCE**, 329; **CONTRACTS**, 559; **PRINCIPAL AND SURETY**, 482.

1. The mere possession of a negotiable promissory note by another than the payee, which is not payable to bearer and is unindorsed, is not prima facie evidence of the ownership of such note. Accordingly, it was error for the trial court to direct a verdict for the amount of the note in suit, there being no other evidence of title, and plaintiff's ownership being denied by the answer. *Shepard v. Hanson*, 249.
2. In an action on a negotiable note by an indorsee, the mere allegation in the answer of fraud in the inception of the note, does not throw on plaintiff the burden of proving that he is a good faith holder; that burden is thrown on him only after the fraud has been established. *Ravicz v. Nickells*, 536.
3. In an action by an indorsee of a negotiable promissory note to recover thereon against the maker, when evidence is introduced which shows that such note was obtained by fraud, and was without consideration, the burden shifts to the plaintiff to establish by competent evidence that he is a good-faith purchaser in due course, and without notice. *Vickery v. Burton*, 6 N. D. 245, 69 N. W. Rep. 193, followed. *Mooney v. Williams*, 329.
4. Where, in an action, the defendant has signed and filed a stipulation of facts as evidence upon which the case is to be determined, which recites that the note in suit was indorsed by the payee to the plaintiff before maturity, for a valuable consideration, in the ordinary course of business, and without notice, the legal effect of such stipulation is to sustain the burden of proof cast on the plaintiff, and also to cut off the defense of fraud and want of consideration. *Mooney v. Williams*, 329.

NEW TRIAL.

1. Where the complaint in an action for claim and delivery stated the total value of the property at \$1,500, the answer denied the value; the sheriff seized a portion only of the property described in the complaint, and in his return described the property so seized by items and with particularity. The verdict was for defendants and fixed the value of the property seized by the sheriff and described in his return at \$2,000; there was no evidence of the value of the property seized. A motion for a new trial was made upon the ground that the verdict as to the value of the property was not justified by the evidence, motion granted and the action of the trial court in granting the motion sustained. *Northwood Trust & Safety Bank v. Magnussen*, 151.
2. A new trial will not be granted on the ground that the evidence is insufficient to sustain the verdict, where the verdict rests upon substantial evidence. *Magnussen v. Linwell*, 154.
3. A new trial will be granted where the instructions were not applicable under the evidence and tended to mislead and confuse the jury. *Welter v. Leistikow*, 283.
4. A new trial will not be granted because of insufficiency of the evidence to sustain the verdict, where the evidence is conflicting, and there is substantial evidence to sustain the verdict. *State v. Montgomery*, 405.

NOTICE OF APPEAL. See APPEAL AND ERROR, 82, 458.

1. A request embraced in the notice of appeal either to try the case anew or retry certain specified facts is wholly inoperative and confers no authority upon the Supreme Court to retry the case or any fact in the case. *Hayes v. Taylor*, 92.

NOTICE OF TRIAL.

1. Where a civil case is properly upon the trial calendar of the District Court, and notice of trial has been properly served, and thereafter an appeal is taken to the Supreme Court unaccompanied by an undertaking staying all proceedings in the District Court pending the appeal, and the case is remanded to the District Court for trial, a new notice of trial is necessary. *Oswald v. Moran*, 170.
2. Where a case has been regularly upon the trial calendar at previous terms upon an issue of law raised by a demurrer, and such issue has been disposed of by final order, the clerk of the District Court is without authority to place the case upon the calendar of a subsequent term upon an issue of fact subsequently joined unless a new note of issue is filed, neither is the party entitled to force such fact issue to trial without serving a new notice of trial. *Oswald v. Moran*, 170.
3. Where it appeared that the issue of law raised by the demurrer had been finally disposed of at a prior term of court and that subsequent to the joinder of issue of fact no note of issue had been filed with the clerk or notice of trial served upon the adverse party, a motion to strike the case from the calendar should have been granted. *Oswald v. Moran*, 170.
4. To get a case upon the trial calendar subsequent to its determination on appeal to the Supreme Court a new notice of trial is necessary, if upon the appeal a supersedeas bond was given. *Oswald v. Moran*, 170.

NOTICE OF JUDGMENT.

1. Notice of an appealable order may be served upon appellant's counsel by delivering to him a copy of such order, and such service alone is sufficient notice of the order to set in motion the statute limiting the time of appeal. *Keogh v. Snow*, 458.

NUISANCES. See INTOXICATING LIQUORS, 566.

OVERRULED CASES. See LIMITATION OF ACTIONS, 1.

1. The fixing of the time within which to bring an action is purely a legislative function. In so far as the language of the case of *Merchants National Bank v. Braithwaite*, 7 N. D. 358, 75 N. W. Rep. 244, conflicts with the case here decided, it is disapproved and overruled. *Osborne v. Lindstrom*, 1.
2. The case of *Finlayson v. Peterson*, 5 N. D. 587, construing Comp. Laws, section 5414, distinguished. *McDonald v. Nordyke Marman Co.*, 290.

OWNER. See MECHANIC'S LIENS, 57.

PARENT AND CHILD. See FRAUDULENT CONVEYANCES, 306.

PARLIAMENTARY RULINGS. See ELECTIONS, 461, 450.

1. Judicial tribunals cannot pass upon the correctness of parliamentary rulings or tactics adopted in political conventions. *State v. Lavik*, 461.

PARTIES. See INTERPLEADER, 339; QUIETING TITLE, 306.

1. Under Rev. Codes, 1899, section 5238, providing that the court may determine any controversy between the parties before it when it can be done without prejudice to the rights of others, and authorizing it to interplead other parties, the District Court must determine any controversy between the original parties to an action, without interpleading other parties, whenever such controversy can be determined without prejudicing the rights of such other parties, or of the parties to the record. *Northwestern Tel. Exch. Co. v. Northern Pac. Ry. Co.*, 306.
2. A party contracting in his own name with a third person, but for an undisclosed principal, may maintain an action upon such contract. *Stewart v. Gregory, Carter & Co.*, 618.
3. An executor's bondsmen are not mere indemnitors within Civil Code, chapter 61, and hence the fact that they were not parties to the executor's accounting *held* immaterial in an action on a bond to recover a judgment against the administrator. *Joy v. Elton*, 437.
4. In an action to recover a statutory penalty for failure of the defendant to destroy noxious weeds as provided by sections 1683-1686, Rev. Codes, the state is not a proper party plaintiff. *State v. Messner*, 186.
5. Penalties can only be recovered in civil actions in this state by the party for whose benefit the recovery can be had. *State v. Messner*, 186.
6. Section 5230, Rev. Codes, provides that any person may be made a defendant who has, or claims, an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination of the questions involved therein. *Bolton v. Donoan*, 575.

PARTIES—Continued.

7. Section 5238, Rev. Codes, declares that the court may determine any controversy between the parties before it when it can be done without prejudice to the rights of others, but when a complete determination cannot be had without the presence of other parties the court must cause them to be brought in. Plaintiff commenced an action for the recovery of money only against D. as sole defendant. *Held*, that the court has no jurisdiction to bring a third party into the action as additional defendant on the ground that the third party alone was liable, since the interest of the third party could not be prejudiced by the determination of the controversies between the plaintiff and D., and plaintiff could not be compelled to litigate such a claim against a party he had not chosen to sue. *Bolton v. Donovan*, 575.

PARTITION.

1. In an action in equity to partition farm lands owned by several co-tenants, one of the co-tenants demanded that he be allowed compensation for breaking and back-setting done by a remote grantor in his chain of title. *Held*, that inasmuch as it did not appear that such improvements were necessary, or that they were assented to by his co-tenants, and it did not appear that they were for the personal benefit of the person making them, and that the rents of the premises for the time he possessed them more than offset the value of such improvements, such claim should not be allowed. *Gjerstadengen v. Hartzell*, 268.

PAYMENT.

1. Party pleading payment has the burden of proving it. *Lokken v. Miller*, 512.
2. An obligation to pay money is not discharged by the mere delivery of an obligation by a stranger to the transaction without an agreement between the debtor and creditor that the same shall be accepted by the creditor as such payment. *Lokken v. Miller*, 512.
3. In an action to recover money paid under a mutual mistake of fact where it appears that the plaintiff prior to and at the time of paying over the money had in his hands the present means of ascertaining whether or not the fact in question existed, but negligently omitted to make the investigation which, if made, would have discovered the fact in question, and on account of such negligence the defendant lost a valuable right. Plaintiff *held* not entitled to recover. *Fegan v. Great Northern Ry. Co.*, 30.

PENALTIES. See PARTIES 186.

1. Penalties can only be recovered in civil actions in this state by the party for whose benefit the recovery can be had. *State v. Messner*, 186.
2. An action cannot be started in the name of the state to recover a statutory penalty. *State v. Messner*, 186.

PLEADING. See USURY, 60; PRACTICE, 19, 96; COUNTER CLAIM, 268; DIVORCE, 192.

1. A complaint, by an executrix of the last will and testament of her deceased husband, to recover double the interest paid for money borrowed from a national bank by her husband during his lifetime, which shows that no payments were made thereon by the husband and that the total payments made to the bank by her as executrix did not equal in amount the sum alleged to have been

PLEADING—Continued.

- borrowed, with lawful interest, and that the additional payments which constitute the usury were made by her in her individual capacity prior to her qualifying as executrix does not state a cause of action in her representative capacity. *Lealos v. Union Nat. Bank*, 60.
2. The method of attacking the sufficiency of the complaint, after failure to demur, is by a motion for judgment. *James River National Bank v. Purchase*, 280.
 3. An objection, at the opening of a trial, to the introduction of any evidence on the ground that the complaint does not state facts sufficient to constitute a cause of action, is insufficient where attention is not directed to the particular defect in the complaint relied on. *James River Nat. Bank v. Purchase*, 280.
 4. In an action brought under the general banking laws of the United States to recover the penalty prescribed for usury paid upon loans, the complaint should specifically plead the section by its number or otherwise point to the section either in terms or by reference to the chapter in which it is found. *Erickson v. Citizens Nat. Bank*, 81.
 5. In an action of partition, a demurrer, interposed to the portions of the answer which set up facts by way of an estoppel to defeat plaintiff's title and the counterclaim for improvements, was properly sustained. *Gjerstadengen v. Hartzell*, 268.
 6. Where the complaint in an action against several defendants states a cause of action as against either of the defendants, a joint demurrer to the complaint for insufficiency is properly overruled. *Dalrymple v. Security Loan & Trust Co.*, 306.
 7. A joint demurrer to a complaint upon the ground of a defect of parties defendant will be overruled if the action can be maintained, without prejudice as to the rights of any one defendant, without bringing in new parties. *Dalrymple v. Security Loan & Trust Co.*, 306.
 8. The demurrer of the defendants made jointly to the complaint for a defect of parties defendant was properly overruled for the reason that upon the facts pleaded the interests of the defendants did not require the bringing in of additional parties to the action. *Dalrymple v. Security Loan & Trust Co.*, 306.
 9. Where an action is brought in behalf of minors by their guardian it is incumbent upon the guardian to set out facts in an issuable form, in his complaint, which show his representative capacity and the character in which he sues, and a complaint in such a case which does not do so is demurrable, but such demurrer must be special and upon the ground of want of capacity to sue, unless so made such objection is waived. *Dalrymple v. Security Loan & Trust Co.*, 306.
 10. Where a claim against the estate of a deceased person has been rejected by the administrator, and suit is not brought thereon within three months after its rejection, an answer, alleging that the claim was duly presented on July 1st, 1897, that the same was not acted upon within ten days thereafter, or at all, and that more than three months after such ten day period had expired before suit was commenced, states a complete defense. *Boyd v. Von Neida*, 337.
 11. The answer of a surety to a complaint on promissory notes, which alleges that the notes were extended without his knowledge or con-

PLEADING—Continued.

- sent, and does not allege the time to which they were extended, or that the payee agreed to extend time of payment for any definite period, does not allege a valid extension and states no defense. *McCormick Machine Co. v. Rae*, 482.
12. In an action upon a negotiable note by the indorsee thereof, the mere allegation in the answer of fraud in the inception of the note does not throw upon plaintiff the burden of proving that he is a good-faith holder; that burden is thrown upon him only after the fraud has been established. *Ravicz v. Nickells*, 536.
 13. Where, in an action upon a negotiable note by an indorsee thereof, the defendant sets up facts which constitute a claim in his favor for damage against the original payee in an amount in excess of the note, and asks to defeat a recovery upon the note by reason of such facts, the matter so pleaded is defensive merely, and requires no reply. *Ravicz v. Nickells*, 536.
 14. The plea of payment in an answer to a complaint for a liquidated demand confesses the cause of action and casts the burden upon the defendant to sustain such plea. *Lokken v. Miller*, 512.
 15. The answer of a surety to a complaint on a promissory note, which merely alleges that the note was extended without his knowledge or consent, and did not allege the time to which it was extended, or that the payee agreed to extend time of payment for any definite period, did not allege a valid extension and stated no defense, but said answer was demurrable. *McCormick Harv. Mach. Co. v. Rae*, 482.
 16. To entitle a party to foreclose a mechanic's lien upon a building only, and sell the same separate and apart from the land upon which it stands, the complaint should show either that the building was erected by one who had a leasehold interest in the land whereon the building is situated and that the lease has become forfeited or that there were existing liens upon the land at the time the materials were furnished or labor done for which the lien is claimed. *Gull River Lumber Co. v. Briggs*, 485.

POLITICAL CONVENTIONS. See ELECTIONS, 450.

1. Judicial tribunals will not pass on the correctness of parliamentary rulings or tactics adopted in political conventions. *State v. Lavik*, 461.
2. A political convention is the exclusive judge of the credentials and qualifications of persons claiming to be delegates thereto, and a minority of the delegates, as thus determined by the convention, cannot, by withdrawing from said convention and joining themselves to the persons whose credentials have been rejected by the convention, constitute a legal party convention. *State v. Lavik*, 461.

POSSESSION. See PRINCIPAL AND AGENT.

POSTPONEMENT. See CONTINUANCE.

1. Where, after issue joined in a criminal action pending in the District Court, the defendant is desirous of obtaining the testimony of a non-resident witness in his own behalf, and where the defendant desires a postponement of the trial or a continuance of the action over the term to obtain such testimony, it is incumbent upon him to apply to the court or judge upon notice to the county attorney for the issuance of a commission out of and under the seal of the court to take such testimony. An application for a continuance or postponement to take such non-resident testimony cannot be granted except in connection with an application for a commission. *State v. Murphy*, 175.

PRACTICE. See TRIALS, 19, 113, 280; BURDEN OF PROOF, 536; NEW TRIALS, 154, 283; MECHANICS' LIENS, 140; JUDGMENTS, 239.

1. An objection to the introduction of any evidence upon the ground that the complaint does not state facts sufficient to constitute a cause of action, made at the opening of the trial, is insufficient in not directing attention to the particular defect in the complaint relied upon. *James River Nat. Bank v. Purchase*, 280.
2. A party who fails to attack a complaint by demurrer upon the ground that it does not state facts sufficient to constitute a cause of action does not, by such failure, waive his right to urge such objection thereafter, such right is saved by section 5272, Rev. Codes. *James River Nat. Bank v. Purchase*, 280.
3. The method for attacking the sufficiency of the complaint upon the grounds of insufficiency, after failure to demur, is by motion. *James River Nat. Bank v. Purchase*, 280.
4. A judgment dismissing an action entered upon the objection to the introduction of any evidence upon the part of the plaintiff for the reason that the complaint does not state facts sufficient to constitute a cause of action, is irregular in that it is not based upon any ground authorized by the statute or established rules of procedure, such objection, being directed to the admission or exclusion of evidence, cannot take the place of a formal motion. *James River Nat. Bank v. Purchase*, 280.
5. While it is proper in rendering judgment to state the grounds on which the court acted, it is error for the court to state the extent to which the judgment may or may not prejudice the rights of the plaintiff in prosecuting other actions between the parties. *Prondzinski v. Garbutt*, 239.
6. On motion to vacate a default judgment and for leave to answer the moving party must present an affidavit of merits and his proposed answer properly verified. *Emmons County v. Thompson*, 598.
7. It was proper to vacate a judgment entered where no findings of fact or law were made or filed, and findings were not waived; such judgment being irregular and without authority of law. *Prondzinski v. Garbutt*, 239.
8. Where, after judgment was vacated because rendered without findings of fact or law, the court filed such findings, it was not error to enter judgment thereon. *Prondzinski v. Garbutt*, 239.
9. A verdict is properly set aside, and a new trial granted, where the instructions were not applicable under the evidence, and tended to mislead and confuse the jury. The fact that such instructions may state correct legal propositions in no manner changes the rule. *Welter v. Leistikow*, 283.
10. Error in admitting incompetent and hearsay evidence may be cured by instructing the jury to disregard the same, but the instruction must be as broad as the evidence improperly received. *Kneeland v. Great Western Elev. Co.*, 49.
11. In an action to recover damages for negligence, the question whether the acts complained of constitute negligence is for the jury. This is not the case, however, when it is apparent that fair minded men would not infer negligence from the facts proved. *Owen v. Cook*, 134.
12. An objection to the introduction of any evidence under the complaint

PRACTICE—Continued.

- upon the ground that the complaint does not state facts sufficient to constitute a cause of action cannot be sustained because too general in not directing the attention of the trial court to the particular defect in the complaint upon which the party making the objection relied. *Erickson v. Citizens Nat. Bank*, 81.
13. An objection to the introduction of any evidence in the case upon the ground that the complaint does not state facts sufficient to constitute a cause of action is insufficient in not directing the attention of the trial court to the defect in the complaint upon which the party making the objection relies. *Chilson v. Bank of Fairmount*, 96.
 14. The error in admitting hearsay evidence by plaintiff as to the gross amount of grain delivered to him based upon his knowledge of the amount he was paid for by his consignee is not cured by withdrawing from the jury the evidence as to the gross amount delivered, but not withstanding plaintiff's statement as to the amount he was paid for by the consignee. *Kneeland v. Great Western Elev. Co.*, 49.
 15. Plaintiff sued to recover for an alleged under delivery of flax. One of the questions for the jury to determine was, how much flax was delivered to plaintiff on the cars. Plaintiff testified in figures the exact amount in net bushels of flax which was delivered, and on cross-examination that he predicated his statement upon the amount of pay for the flax, which was remitted to him by his agent in Duluth who sold the flax. Counsel for defendant moved to strike out this evidence as hearsay. The motion was denied. *Held*, error. *Kneeland v. Great Western Elev. Co.*, 49.
 16. An objection to the introduction of any evidence upon the ground that the complaint does not state a cause of action made at the beginning of the trial is insufficient. The attack at that stage of the case must be specified. *Schweinber v. Great Western Elev. Co.*, 113.
 17. To entitle a party to a civil action in the District Court wherein issue has been joined to bring such issue to trial at a term of court it is necessary that prior to said term he shall furnish the clerk of the court a note of the issue to be tried, and also to serve the adverse party with a notice of trial, and it is also necessary that the note of issue state whether the issue is one of law or one of fact. *Oswald v. Moran*, 170.
 18. It was error for the trial court to direct a verdict for the amount of the note in suit, it not being payable to bearer and unindorsed, the plaintiff in possession being a person other than the payee named in the note and there being no evidence of title in plaintiff, his ownership being denied by the answer. *Shepard v. Hanson*, 249.
 19. A defendant who wishes to avail himself of error in denial of a motion for a directed verdict made at the close of plaintiff's case, must, in case he thereafter introduces testimony, renew the motion at the close of the case, otherwise the error is waived. *First Nat. Bank v. Red River Valley Nat. Bank*, 319.
 20. In an action upon a negotiable note by an indorsee thereof, the mere allegation in the answer of fraud in the inception of the note does not throw upon plaintiff the burden of proving that he is a good-faith holder. That burden is thrown upon him only after the fraud has been established. *Ravicz v. Nickells*, 536.

PRACTICE—Continued.

21. Where, in such an action the defendant sets up facts which constitute a claim in his favor for damages against the original payee in an amount in excess of the note, and asks to defeat a recovery upon the note by reason of such facts, the matter so pleaded is defensive merely, and requires no reply. *Ravicz v. Nickells*, 536.
22. Where a party sets forth facts by which he claims he has been damaged in a large sum, and goes to trial upon such facts before a jury, he cannot be heard, after verdict and judgment against him, to allege that the facts entitle him to equitable relief. *Ravicz v. Nickells*, 536.

PREROGATIVE WRITS. See INJUNCTIONS, 480.

1. The Supreme Court, in the exercise of its original jurisdiction, can issue a writ of injunction only on an information therefor filed by the attorney general, or under his authority, and by leave of court first obtained, and in the name of the state. *Anderson v. Gordon*, 480.

PRESUMPTIONS. See EVIDENCE, 263, 278, 442.

1. Where a party is shown to be an alien, such alienage is presumed to continue until some evidence to the contrary is produced. *Kadlec v. Pavik*, 278.
2. Proof that a party voted in this country raises a presumption of naturalization. *Kadlec v. Pavik*, 278.
3. The law will not presume that the party committed an unlawful act. *Kadlec v. Pavik*, 278.
4. The legal presumption is that an erasure upon a bond was innocent and not fraudulent in fact or law. *Cass County v. American Exch. State Bank*, 263.
5. In the absence of testimony the law presumes that a chattel mortgage is delivered on the day of its date. *Schweinber v. Great Western Elev. Co.*, 113.
6. A written instrument carries presumptive evidence of consideration and casts the burden of showing a want of consideration upon the parties seeking to invalidate or avoid it. *Dalrymple v. Security Loan & Trust Co.*, 319.

PRINCIPAL AND AGENT. See ALTERATION OF INSTRUMENTS, 285; BROKERS, 285.

1. A real estate broker, with whom lands are listed for sale by the owner, has no authority to make contracts for the sale thereof which will bind the owner, in the absence of written authority signed by such owner authorizing him so to do. *Ballou v. Bergvendsen*, 285.
2. A contract, for the sale of land, executed by the owner and left with his agent for delivery to the purchaser, was altered by the agent by substituting the name of another person and changing both the consideration and the rate of interest and then delivered to such other person, the contract so delivered was not the contract of the owner. *Ballou v. Bergvendsen*, 285.
3. Possession of an unendorsed bill of lading by a person other than the consignor or consignors raises no presumption that such person is the agent of the consignor. *Stewart v. Gregory, Carter & Co.*, 618.
4. To charge a principal with knowledge or notice on the part of his agent, which said knowledge or notice came to the agent prior to his employment as such agent, it must appear that such knowledge or notice was present in the mind of the agent when he acted for

PRINCIPAL AND AGENT—Continued.

the principal in the action in which the principal is sought to be charged with such knowledge or notice. *Gregg v. Baldwin*, 516.

5. A party contracting in his own name with a third party, but for an undisclosed principal, may himself maintain an action upon such contract. *Stewart v. Gregory, Carter & Co.*, 618.

PRINCIPAL AND SURETY. See ALTERATION OF INSTRUMENTS, 263; EXECUTORS AND ADMINISTRATORS, 428.

1. A creditor, by extending time of payment to his debtor without the knowledge or consent of a surety, thereby releases such surety. It is necessary, however, to the validity of such extension, that it be upon a sufficient consideration and to a definite time. *McCormick Mach. Co. v. Rae*, 482.
2. The answer of a surety to a complaint on promissory notes, which merely alleges that the notes were extended without his knowledge or consent, and does not allege the time to which they were extended, or that the payee agreed to extend time of payment for any definite period, does not allege a valid extension and states no defense. *McCormick Mach. Co. v. Rae*, 482.
3. The sureties upon the bond of an executor in the County Court, are not mere indemnitors within the meaning of chapter 69 of the Civil Code, and hence the fact that the bondsmen were not present and were not made parties to the accounting, does not invalidate the judgment as against them. *Joy v. Elton*, 428.
4. The surety on an administrator's bond is concluded by and cannot attack collaterally a final settlement made from which there has been no appeal. *Joy v. Elton*, 428.
5. Where an executor is also a trustee under a will the sureties on the executor's bond will be bound until such time as the executor shall account as executor and qualify as trustee. There must be some open and notorious act done by the executor whereby it may be known that the line has been crossed which separates the capacity of the executor from that of the trustee. *Joy v. Elton*, 428.
6. A surety may attack a final judgment collaterally upon the ground of fraud and collusion, but not otherwise. *Joy v. Elton*, 428.
7. In an action upon a bond which, upon its face, showed that one name had been signed as surety and subsequently erased, the erasure was presumptively innocent, and the burden rested upon the other signers to show that their implied contract of contribution had been altered by the erasure. *Cass County v. American Exch. State Bank*, 263.
8. The sureties upon the bond of an ancillary executor are responsible for any misappropriation of personal property found in this state and belonging to the estate of the deceased, or of debts collected in this state by a foreign executor, without suit, and while acting solely under the authority of letters testamentary, issued in another state by the court of original jurisdiction. *Joy v. Elton*, 428.
9. The sureties upon a bond of an ancillary executor for the proper administration of the estate in the ancillary jurisdiction are responsible only for the faithful conduct of the ancillary executor with respect to duties assumed and property received by him pursuant to his ancillary appointment. *Joy v. Elton*, 428.

PROBATE COURTS. See COUNTY COURTS, 428.

PROCEDURE. See PRACTICE, 140.

PROXIMATE CAUSE. See NEGLIGENCE, 134.

QUIETING TITLE. See ASSESSMENT AND TAXATION; ACTION TO QUIET TITLE, 306, 538.

RAILROADS. See COVENANTS, 73; LANDLORD AND TENANT, 73.

1. A covenant to save a railroad lessor harmless from loss of property on demised premises from fires set by lessor's engines, *held*, to pass to lessor's assignee under the transfer of all its property. *Northern Pacific Ry. Co. v. McClure*, 73.

REASONABLE DOUBT. See INSTRUCTIONS, 165.

RECEIVERS. See BUILDING AND LOAN ASSOCIATIONS, 364.

1. The receiver of an insolvent building and loan association may, if the stock of the defendant had not in fact been matured by payments, recover upon the original stock subscription contract the unpaid stock subscription of any non-borrowing stockholder, and the principal of mutuality is not affected by the bond and mortgage. *Clarke v. Olson*, 364.
2. In an action brought by a receiver of a building and loan association to foreclose a mortgage securing a bond to the association for the amount borrowed by the stockholder and the premium bid therefor, *held*, that the transaction was a discount of the shares and not a loan of money, and that the mortgage secured the payment of monthly dues for the period of nine years, and that all monthly dues paid must be deducted from the amount stipulated, and judgment rendered for the remainder. *Clarke v. Olson*, 364.

RECORDING TRANSFERS.

1. The purchasers of certain promissory notes secured by real estate mortgage, by neglecting to take and place of record an assignment of the mortgage, forfeited their rights under said mortgage as against another who purchased the mortgaged premises in good faith, and in reliance upon the record title. *Henniges v. Paschke*, 489.
2. Assignments of real estate mortgages are conveyances within the meaning of section 3594, Rev. Codes, and under said section, for the purpose of notice, must be recorded, and if not, such records are void as to subsequent purchasers of the mortgaged premises who purchased in good faith for a valuable consideration, and first recorded the conveyances. *Henniges v. Paschke*, 489.

REDEMPTION. See MORTGAGES, 224.

REFORMATION OF INSTRUMENTS. See EQUITY, 182; CONTRACTS, 182.

1. In an action to reform a contract, it appeared that the contract as made was claimed by plaintiff to be a lease giving him the right to all the premises included therein except such as were specially reserved, and by defendant to be a cropper's contract giving plaintiff the use of only such lands and buildings as were specially granted; that an oral contract was made which it was intended the written contract should embody; that plaintiff claimed this oral contract to be complete and to contemplate a lease, and that defendant sent word to another that plaintiff had rented the whole farm of de-

REFORMATION OF INSTRUMENTS—Continued.

fendant; that defendant claimed the oral contract to be merely an outline of the proposed written contract, but admitted that he told the scrivener that plaintiff could tell him all about the terms of the contract to be written. *Held*, that there was a preponderance of evidence that it was intended to execute a lease, and the contract would be reformed. *Merchant v. Pielke*, 182.

REHEARING. See APPEAL AND ERROR, 550.

1. No question will be considered upon a petition for rehearing that was not presented on the argument, or decided in the opinion of the court and assigned as error in the brief. *Sweigle v. Gates*, 550.

REMAND OF RECORD.

1. A party may, by laches, lose the right to have a record remanded to the District Court for correction. *Security Imp. Co. v. Cass County*, 553.
2. A record will not be remanded for the purpose of having any matter inserted therein that does not appear in the record of the lower court as it stood when the appeal was taken, unless proceedings that were actually had in the lower court were by inadvertence omitted from the record. *Security Imp. Co. v. Cass County*, 553.
3. A record will not be remanded to the District Court for the purpose of reinvesting the jurisdiction of the District Court to the end that such court may make new findings that will support the judgment ordered. *Security Imp. Co. v. Cass County*, 553.
4. Upon a proper showing and a timely application the Supreme Court will transmit records to the District Court for correction. *Montgomery v. Harker*, 535.
5. After a case has been submitted to the court on the merits, parties will not be allowed the privilege of amending the record except on condition of making a very satisfactory showing. *Montgomery v. Harker*, 535.
6. The Supreme Court will not remand the record on appeal to the District Court for the purpose of enabling counsel to appeal to that court for leave to incorporate a new feature in the statement of the case. *Security Imp. Co. v. Cass County*, 553.

RENTS AND PROFITS. See PARTITION, 268; MORTGAGES, 224.

REPEALS. See STATUTES, 140.

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RESIDENCE. See DIVORCE, 88.

REVENUE. See ASSESSMENT AND TAXATION, 213.

ROBBERY. See CRIMINAL LAW, 175.

ROADS AND BRIDGES. See HIGHWAYS, 623.

SECRETARY OF STATE.

1. The secretary of state has no judicial power to inquire into the regularity or legality of nominations for office that are filed with him, but must certify to the proper county officer the names of all persons whose nominations for office have been duly filed with him. *State ex rel. Wolfe v. Falley*, 450.

SECRETARY OF STATE—Continued.

2. When two nominations, purporting to be by the same party for the same office, are filed with the secretary of state, it is his duty to refuse to certify to the proper county auditors the names contained in both nominations. The law requires him, however, to certify the name of the regular party nominee, and, if he refuse so to do, he may be coerced by mandamus. *State ex rel. Wolfe v. Falley*, 450.
3. Certificates of nomination are required to be filed with the secretary of state not less than 30 days before election. A certificate filed 29 days before election cannot be legally filed by the secretary. *State ex rel. Anderson v. Falley*, 464.
4. The fact that the thirtieth day before election fell on Sunday will not change this rule. Section 5127, Rev. Codes, relating to excluding holidays, has no application to a case of certifying nominations for office, and the secretary of state cannot certify a nomination where the certificate is not filed in time. *State ex rel. Anderson v. Falley*, 464.

SHERIFFS.

1. The fact that a sheriff and deputy are sworn as witnesses in a criminal case does not, of itself, operate to disqualify them from acting as bailiffs in charge of the jury during their deliberations. *State v. Rosencrans*, 163.

SITUS OF PERSONAL PROPERTY. See EXECUTORS AND ADMINISTRATORS, 441.

SODOMY.

1. The nature of punishment which may be legally imposed upon one attempting to commit the crime of sodomy is provided by subdivision 1 of section 7694, Rev. Codes. One who was convicted of an attempt to commit the crime of sodomy was properly sentenced to five years in the penitentiary, the crime of sodomy being punishable to the extent of ten years in the penitentiary. *State v. King*, 149.

SPECIAL APPEARANCE.

1. Where a defendant in Justice's Court has been served with process outside of the county of the justice, he does not submit to the jurisdiction by appearing specially and moving to dismiss the action for want of jurisdiction over the person because not served within the proper county. *Searl v. Shanks*, 204.

SPECIFICATION OF PARTICULARS. See APPEAL AND ERROR, 81; STATEMENT OF THE CASE, 81, 93, 112, 553, 615.

1. Under the provisions of section 5630, Rev. Codes, as amended by chapter 5, Laws 1897, the statement of the case on appeal must embody a specification, either that the appellant desires a review of the entire case in the Supreme Court or of some particular fact or facts designated. *Erickson v. Citizens Nat. Bank*, 81 *Hayes v. Taylor*, 92; *Mooney v. Donovan*, 94; *National Cash Register Co. v. Wilson*, 112; *Security Imp. Co. v. Cass County*, 553; *Douglas v. Glazier*, 615.
2. In appeals under the provisions of section 5630, Rev. Codes, as amended by chapter 5, Laws 1897, specifications of particulars wherein the appellant claims that the findings of fact are not justified by the evidence cannot be considered where plaintiff

SPECIFICATION OF PARTICULARS—Continued.

neither demands a review of the entire case in the Supreme Court nor specifies in his statement of the case any fact or facts which appellant desires retried. *Erickson v. Citizens Nat. Bank*, 81.

3. In actions tried to the court without a jury specifications of particulars in which findings of fact are without support in the evidence are superfluous in a stated case on appeal, and confer no authority upon the Supreme Court to retry the case or any fact in the case anew. Such specifications appertain to jury cases but not to cases tried to the court. *Erickson v. Citizens Nat. Bank*, 81.

SPECIFIC PERFORMANCE. See ASSIGNMENTS, 12.

1. Where it appeared that long prior to the commencement of the action for specific performance the plaintiffs had transferred, each acting separately and at different dates, all their right, title and interest arising under the contract of purchase and sale to the defendants, and that such transfers were made knowingly and willingly without fraud and upon adequate consideration, the plaintiffs were without equity and without standing in court for specific performance. *Magnussen v. Linwell*, 157.

STATEMENT OF THE CASE. See APPEAL AND ERROR, 293, 81, 553, 615, 535.

1. Where a statement of the case was settled after time and without an affirmative showing, upon the part of appellant, of grounds for settling the same after time, the statement was stricken from the record upon motion of respondents. The fact that no cause for an extension was shown appeared affirmatively upon the record, and in such cases no power to extend time exists in the trial court. *McDonald v. Beatty*, 293.
2. In a settled statement of the case appellant must embrace a demand for a retrial of the entire case, or of some specified fact in the case under section 5630, Rev. Codes, else the Supreme Court will refuse to retry any fact or consider the evidence for any purpose. *Security Imp. Co. v. Cass County*, 553; *Douglas v. Glazier*, 615; *Erickson v. Bank*, 81; *Mooney v. Donovan*, 94; *National Cash Register Co. v. Wilson*, 112.
3. The Supreme Court will not amend the statement of a case, but, on proper showing, may remand the record to the district court for correction. *Montgomery v. Harker*, 535.
4. The duty of settling bills of exceptions and statements of the case is imposed on the judge of the District Court before whom the case was tried, and the Supreme Court must accept the bill certified as correct. The Supreme Court cannot amend the statement of the case on motion and affidavit, but can certify the record back to the District Court to be there corrected by the judge who tried the case. *Montgomery v. Harker*, 535.
5. The statement of the case embodied specifications of alleged errors of law arising upon rulings of the court below upon the admission of testimony, and also a specification based upon the refusal of the trial court to direct a verdict in defendant's favor. The statement further embraced specifications of particulars wherein the appellant claimed that the respective findings of fact were not justified by the evidence. But the statement of the case contained no declaration, as required by said act of 1897, to the effect that the appellant desired a review of the entire case in the Supreme Court nor did the statement embrace a specification of any fact or facts which

STATEMENT OF THE CASE—Continued.

appellant desired the Supreme Court to review. *Held*, that, by reason of said omissions in the statement of the case, the Supreme Court cannot retry either the entire case, or any particular fact in the case, *de novo*. *Held*, further, that in such cases the Supreme Court does not sit as a court of review, to correct errors arising upon rulings of the District Court upon the admission of evidence. Such rulings will only be passed upon in connection with a retrial in this court. *Nichols & Shepard Co. v. Stangler*, 7 N. D. 102, 72 N. W. Rep. 1089, followed. *Erickson v. Bank*, 81.

6. The certificate of the trial judge to a statement of the case tried under section 5630, Rev. Codes, as amended by chapter 5, Laws 1897, recited that such statement "contains all the evidence introduced." This was adjudged sufficient to secure a review of the entire case, it not appearing elsewhere in the record that the statement did not contain all the evidence offered. *Erickson v. Kelly*, 13.
7. Specifications of particulars in which defendant claims that the findings of fact are without support in the evidence are superfluous, under the statute, and confer no authority upon the Supreme Court to retry the case, or any fact in the case, anew. Such specifications appertain to jury cases, but not to cases tried to the court. *Bank v. Davis*, 8 N. D. 83, 76 N. W. Rep. 998, followed. *Erickson v. Bank*, 81.
8. In cases tried in the District Court without a jury, the Supreme Court on appeal is without authority to retry either distinct questions of fact or the entire case *de novo*, where the statement of the case does not contain either specifications of fact or a request to review the entire case. *Hayes v. Taylor*, 92; *Mooney v. Donovan*, 93; *National Cash Register Co. v. Wilson*, 112.

STATE'S ATTORNEY. See ATTORNEYS, 379; COUNTIES, 115.

1. The duties of the state's attorney, as to the enforcement of the laws relating to the sale of intoxicating liquors, are found in part in section 7604, Rev. Codes, which requires state's attorneys to diligently prosecute any and all violations of such law, and makes the neglect or failure to do so a misdemeanor punishable both by fine and imprisonment, and forfeiture of office. *In re Simpson*, 379.

STATUTES. See TAXATION, 538.

1. Section 1548, Comp. Laws, which required the assessor to list property in the name of the owner, if known, and if not known to list the same to unknown owners, is mandatory and not merely directory. Hence, an attempted assessment of the lots in which the assessor omitted to list the name of the owner, or to unknown owners, was void. *Sweigle v. Gates*, 538.
2. The rule requiring statutes to be given prospective operation only does not apply to statutes relating to procedure. *Craig v. Herzman*, 140.
3. The repeal of the mechanic's lien law as it existed in Compiled Laws by the enactment of the Revised Codes did not operate to extinguish liens that had been acquired under the prior law. Vested rights cannot be divested by repeal of the statute creating them. *Craig v. Herzman*, 140.

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86	404	179	217
87	404-481		

SUBROGATION. See **ASSIGNMENTS FOR BENEFIT OF CREDITORS**, 520.

1. Where a trust deed for the benefit of creditors authorized the trustee to close out the business, and to that end to purchase such staple goods as would the better enable him to do so, and it appeared the trustee was insolvent, the creditors who furnished such goods could be subrogated to the equities of the trustee as to the trust property, including the right to require the beneficiaries to refund, and this, too, though a portion of the goods was so delivered to the trustee after payment of the last dividend. *Wells-Stone Merc. Co. v. Aultman*, 520.

SUPREME COURT. See **INJUNCTION**, 480; **JURISDICTION**, 480; **REMAND OF RECORD**, 553; **APPEAL AND ERROR**.

1. The Supreme Court has an incidental and inherent power to suspend and disbar attorneys from practice for unprofessional conduct, and section 432, Rev. Codes, which purports to create such power in the court is merely a legislative affirmance of a power which already existed. *In re Simpson*, 380.
2. It is the duty of the attorney general, under section 119, Rev. Codes, to represent the state in actions pending before the Supreme Court, whether such actions are civil or criminal, and tax cases come within the purview of this section. *Storey v. Murphy*, 115.

TAXATION. See **ASSESSMENT AND TAXATION**, 546, 583; **COUNTIES**, 115; **INJUNCTIONS**, 115.

TAX DEED. See **ASSESSMENT AND TAXATION**, 538.

1. A tax deed predicated upon an illegal assessment is voidable. *Sweigle v. Gates*, 538.

TRIALS. See **PRACTICE**, 96, 280, 240.

1. Where an amendment of the complaint at the trial is allowed on condition that defendant be given sufficient time to prepare to meet the issues as amended and thereafter defendant announced himself ready and proceeds to trial on the amended pleadings he will not be heard to urge that he was prejudiced by reason of the allowance of such amendment. *McCabe Bros. v. Aetna Ins. Co.*, 19.
2. A defendant who wishes to avail himself of error in denying a motion for a directed verdict, made at the close of plaintiff's case, must, in case he thereafter introduces testimony, renew the motion at the close of the case; otherwise the error is waived. *First Nat. Bank of Fargo v. Bank*, 319.
3. An objection to the introduction of any evidence in a case on the ground that the complaint does not state a cause of action is insufficient in not directing the attention of the trial court to any specific defect in the complaint. *Chilson v. Bank*, 96; *Schweinber v. Great Western Elev. Co.*, 113; *James River Nat. Bank v. Purchase*, 280.
4. The method for attacking the complaint upon the ground of insufficiency after failure to demur is by motion. *James River Nat Bank v. Purchase*, 280.
5. Failure to instruct the jury on a particular phase of the evidence cannot be assigned for error, where no request for the charge was made. *State v. Rosencrans*, 163.
6. To entitle a party to a civil action in the District Court wherein issue has been joined to bring such issue to trial at a term of court it is

TRIALS—Continued.

necessary that prior to said term he shall furnish the clerk of the court a note of the issue to be tried, and also to serve the adverse party with a notice of trial, and it is also necessary that the note of issue state whether the issue is one of law or one of fact. *Oswald v. Moran*, 170.

TROVER AND CONVERSION. See DAMAGES, 319; CONVERSION, 637, 319.

1. The measure of damages recoverable for the wrongful conversion of personal property is fixed by section 5000, Rev. Codes. The injured party may recover the highest market value at any time between the conversion and verdict when the action has been prosecuted with reasonable diligence. *First Nat. Bank v. Red River Valley Nat. Bank*, 319.
2. Where the facts as to diligence are not in dispute, the question whether a case has been prosecuted with reasonable diligence is one for the court. It is necessary in order to secure a review of the determination of the trial court thereon upon appeal to bring up on the record and before the Supreme Court all of the facts upon which such determination was made. *First Nat. Bank v. Red River Valley Nat. Bank*, 319.

TRUSTS AND TRUSTEES. See EXECUTORS AND ADMINISTRATORS, 428, 445; BUILDING AND LOAN ASSOCIATIONS, 364; ASSIGNMENTS FOR BENEFIT OF CREDITORS, 520.

1. Where the same person, is named in a will both as executor and trustee, and is by the terms of the will required to execute the trusts created by the will, the two capacities—those of executor and trustee—are distinct and independent of each other. *Joy v. Elton*, 428.
2. Where the owner of real estate conveys the same to another with intent to defraud his creditors no trust relation between the parties exists. *Lockren v. Rustan*, 43.
3. Where an executor is also a trustee under a will, and qualifies as executor, he and his sureties will be bound until such time as the executor shall account as executor and qualifies as trustee. There must be some open and notorious act done by the executor whereby it may be known that the line has been crossed which separates the capacity of the executor from that of the trustee. *Joy v. Elton*, 428.
4. Where, under the direction of a purchaser paying the consideration, real estate is conveyed by the vendor to a stranger, who is named as grantee in a deed absolute on its face, which grantee nevertheless receives the deed in trust for the sole use and benefit of parties not named in the deed, such parties are the beneficiaries under the deed, and as such are seized of the entire title. *Dalrymple v. Security Loan & Trust Co.*, 306.
5. A trustee is not liable for misadventure in the conduct of a trust business, where the trust deed provided that he should not be liable for mistakes of judgment. *Scott v. Jones*, 551.
6. A general merchant in embarrassed financial circumstances executed a deed of trust for the benefit of his creditors. The deed was executed by the trustor, the trustee, and the beneficiaries. The trustee was authorized to close out the mercantile business, and to that end was authorized to purchase such staple goods to

TRUSTS AND TRUSTEES—Continued.

replenish the stock as would, in his judgment, the better enable him to close out the stock. The beneficiaries were to receive only the net proceeds of the estate after paying all expenses of executing the trust. *Held*, that the trustee had a right to reimburse himself for all expenses incurred in executing the trust before paying dividends to the beneficiaries, and that the purchase price of staple articles so purchased by the trustee to replenish stock constituted a part of the expenses of executing the trust. *Wells-Stone Merc. Co. v. Aultman*, 520.

7. Where the trust estate had been exhausted, and expenses remained unpaid, but large dividends had been paid by the trustee to the beneficiaries, the trustee might, in equity, require the beneficiaries to refund sufficient from the dividends so received to reimburse him for such expenses. *Wells-Stone Merc. Co. v. Aultman*, 520.

ULTRA VIRES CONTRACTS. See CONTRACTS, 115, 364, 467;
CORPORATIONS, 364

1. Where a building and loan association as a condition to doing business in a foreign state, deposited its securities in a specified amount with the treasurer of such state, to be held in trust for the benefit of the shareholders and creditors in such state, and received a license from such state to transact business therein, and so transacted business for a number of years, the association upon becoming insolvent, or a shareholder not resident of such foreign state, cannot plead that the act of the association in making such deposit of securities was ultra vires. *Clarke v. Olson*, 364.
2. A contract of a corporation that is ultra vires, not because prohibited by positive law, or inherently vicious, and not because the corporation could not, under any circumstances, make the contract, but solely because of the existing circumstances and conditions under which it was made, is never void, and the plea of ultra vires will not avail either party to such contract when the contract has been fully executed by the other party. *Tourtelot v. Whithed*, 467.

UNDERTAKING ON APPEAL. See JUSTICES OF THE PEACE.

UTTERING. See FORGERY, 419.

USURY. See BUILDING AND LOAN ASSOCIATIONS, 364.

1. In an action brought under the general banking laws of the United States to recover the penalty prescribed for usury paid upon loans, the complaint must specifically plead the section by its number upon which the action is brought, or otherwise point to the section either in terms or by reference to the chapter in which it is found. *Erickson v. Citizens Nat. Bank*, 81.
2. The right given by section 5198, Rev. St. U. S., to recover double the interest paid to a national bank, when the interest so paid is greater than allowed by the laws of the state, is personal to the party paying such usurious interest; and an action to recover the same can be maintained only by such person, or his or her legal representative. *Lealos v. Bank*, 60.
3. A complaint, by an executrix of the last will and testament of her deceased husband, to recover double the interest paid for money borrowed from a national bank by her husband during his lifetime, which shows that no payments were made thereon by the husband, and that the total payments made to the bank by her as executrix did not equal in amount the sum alleged to have been borrowed,

USURY—Continued.

with lawful interest, and that the additional payments which constituted the usury were made by her in her individual capacity, prior to qualifying as executrix, does not state a cause of action in her representative capacity, under said section. Whether the action to recover for usury paid by an executrix should be maintained in her representative capacity, or individually, not decided. *Lealos v. Bank*, 60.

4. Where two persons execute their joint note in favor of a national bank, which note is claimed to be wholly for usury, and the same is paid by one of the joint makers, an action cannot be maintained, under the section above referred to, to recover the penalty therein provided, by the other maker. The cause of action accrues to the person making the payment. *Lealos v. Bank*, 60.

VARIANCE. See VERDICT, 409.

VENDOR AND PURCHASER. See SPECIFIC PERFORMANCE, 157; QUIETING TITLE, 306; FRAUDULENT CONVEYANCES, 254; MORTGAGES, 224; FRAUD AND DECEIT, 498; DEEDS, 489.

1. The purchasers of certain promissory notes secured by real estate mortgage, neglected to take and place of record an assignment of their mortgage, and thereby forfeited their rights under the mortgage as against a purchaser of the mortgaged premises, who purchased in good faith and in reliance upon the record title. *Henniges v. Paschke*, 489.
2. In an action to set aside a transfer as fraudulent and void and to subject the land to the lien of plaintiff's judgment, if the defense of homestead is not interposed before judgment, it cannot be subsequently raised. *Foogman v. Patterson*, 254.
3. The purchaser of real estate at a mortgage foreclosure sale is entitled to receive from the tenant in possession the rents of the property sold, or the value of the use and occupation thereof, from the date of his purchase until redemption is made, under section 5549, Rev. Codes. *Held*, under the foregoing section of the statute that where farm lands, which are being operated under a contract with the owner which reserves the right and possession of the title in a fixed portion of the grain grown thereon in the owner, as compensation for its use, are sold at foreclosure sale, the purchaser thereof at such sale is entitled to such share as falls due during such redemption period and has the same right thereto as the owner of the land had, and may invoke the same remedies to enforce them. *Whithed v. St. Anthony & Dakota Elev. Co.*, 224.
4. In an action to foreclose a mortgage upon real estate given to plaintiff by defendants to secure the payment of certain notes given as part purchase price for a milling property, which the plaintiff contracted with the defendants to transfer to defendants by warranty deed upon the payment of an agreed consideration of \$10,000, the deed of warranty to be delivered to defendants upon the condition that they should perform certain covenants resting upon them, set forth in the contract for sale and made conditions precedent, and where the plaintiff, at the time of the performance of the covenants resting upon the defendants, refused to deliver to the defendants a deed of warranty of the property, as stipulated in the contract, *held*, that plaintiff's action of foreclosure could not be maintained. *McDonald v. Beatty*, 293.

VENDOR AND PURCHASER—Continued.

5. The rule prevailing in courts of chancery which required the plaintiff in suits brought to quiet title, to show both possession and legal title in himself, is abrogated in this state by statute. Such action may be maintained by a plaintiff who has "an estate or interest in real property," whether legal or equitable. Rev. Codes, section 5904. *Dalrymple v. Security Loan & Trust Co.*, 306.
6. Where, under the direction of a purchaser paying the consideration, real estate is conveyed by the vendor to a stranger, who is named as grantee in a deed absolute on its face, which grantee nevertheless receives the deed in trust for the sole use and benefit of parties not named in the deed, such parties are the beneficiaries under the deed, and as such are seized of the entire title. Such parties are in a position to maintain an action to quiet the title to such real estate. Rev. Codes, sections 3381, 3383, 3386. *Dalrymple v. Security Loan & Trust Co.*, 306.
7. Under the facts set out in the complaint and considered in the opinion, *held*, that it does not appear from the complaint that certain judgments referred to in the complaint are liens upon the title to the real estate in controversy. *Dalrymple v. Security Loan & Trust Co.*, 306.
8. Where it appeared from the complaint that the father of the plaintiffs, upon a consideration paid by him, caused a deed conveying real estate to be made to D. in trust for the sole use and benefit of his children, and that the father was in debt at the time, and that certain creditors had obtained and docketed judgments against him, *held*, that such facts alone, in the absence of allegations of the father's insolvency, or of a fraudulent intent upon the part of the father, do not show that such transfer of real estate was necessarily fraudulent. Hence the same cannot be held to be constructively fraudulent. A fraudulent intent in the transfer of real estate must be made to appear in order to justify a court in setting the conveyance aside as fraudulent as to creditors. Rev. Codes, 1895, section 5055. *Dalrymple v. Security Loan & Trust Co.*, 306.

VERDICT. See NEW TRIALS, 283.

1. Whenever a crime is distinguished into degrees the jury, if they convict the defendant, must find the degree of the crime of which he is guilty. *State v. Belyea*, 353.
2. The jury may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged in the information or indictment, or of an attempt to commit the offense. *State v. Belyea*, 353.
3. The defendant was charged with murder in the second degree. The verdict found the defendant guilty of unlawfully procuring an abortion as charged in the information. The crime of procuring an abortion is an offense not generically associated with the crime of murder in the second degree, hence the verdict is illegal. *State v. Belyea*, 353.
4. The evidence fully justified the jury in finding such token false, in that the defendant had not destroyed gophers in the number or at all, as represented by the certificate presented by him to the county officer purporting to show the number of gophers killed by him and for which he claimed bounty. This on a charge of obtaining money by false pretenses. *State v. Stewart*, 409.
5. Where an indictment charged that money was obtained from the

VERDICT—Continued.

county of Sargent by aid of false pretenses, and the evidence disclosed that a county warrant upon the treasurer was obtained for the money, *held*, that the variance was not fatal. *State v. Stewart*, 409.

6. The jury returned the following verdict in response to instructions given by the court: "We, the jury, find the defendant E. H. Belyea, guilty of the crime of unlawfully procuring an abortion as charged in the information." Such verdict is illegal, because the information charges the crime of murder in the second degree, perpetrated while defendant was engaged in the commission of an independent felony, and because the verdict erroneously assumed that the offense referred to in the verdict is necessarily committed in the commission of the offense of murder in the second degree. *State v. Belyea*, 353.
7. When it is improper to direct a verdict. *Shepard v. Hanson*, 249.
8. A verdict in a criminal case will not be set aside for lack of evidence to sustain it where there is substantial evidence in its support. *State v. Montgomery*, 405.
9. Defendants were accused, by an information filed against them, for the crime of assault and battery while armed with a dangerous weapon, and with intent to do bodily harm. The jury found defendants guilty of an assault with provocation. *Held*, that the words "with provocation," which were added in the verdict, are entirely harmless in that they do not render the verdict obscure in meaning. *State v. Montgomery*, 405.
10. Where a verdict rests upon substantial evidence a new trial will not ordinarily be granted when the application therefor is based solely upon the ground of insufficiency of the evidence to justify the verdict. *Magnussen v. Linwell*, 154.
11. A motion for a directed verdict at close of plaintiff's case if denied to be available for error must be renewed at the close of the entire testimony of the defendant offered in the case, otherwise the error is waived. *First Nat. Bank v. Red River Valley Nat. Bank*, 319.
12. A verdict is contrary to law when it conflicts with the law of the case as laid down by the court in its instructions to the jury. *State v. Peoples*, 146.
13. Evidence considered and *held* sufficient to sustain a verdict against the accused for bastardy. *State v. Peoples*, 146.

VESTED RIGHTS. See MORTGAGES, 140; CONSTITUTIONAL LAW, 140.

VOID INSTRUMENTS. See FORGERY, 419.

VOLUNTARY PAYMENTS. See TAXATION, 68; PAYMENTS, 30.

1. The purchaser of property exempt from execution at a void tax sale acquires no lien upon the property purchased, and if he voluntarily pays subsequent valid taxes thereon he cannot recover the amount so paid from the owner of the property. *McHenry v. Brett*, 60.
2. Where money was paid under a mutual mistake of fact and the payer sued to recover the same and it appeared at the time of payment he had the present means of ascertaining whether or not the fact in question existed, by negligence and to the prejudice of the other party omitted to make the investigation, *held*, that the payment was voluntary and could not be recovered back. *Fegan v. Great Northern Ry Co.*, 30.

VOTERS. See ELECTIONS, 278.

WAIVER. See HOMESTEADS, 255.

1. The homestead right may be waived unless the owner claims his homestead exemption as against an execution levied upon a section of land upon one quarter of which the dwelling house is located. *Foogman v. Patterson*, 255.
2. Purchasers of certain promissory notes secured by real estate mortgage, by neglecting to take and place of record an assignment of the mortgage, forfeited their rights under the mortgage as against the defendant who purchased the mortgaged premises in good faith and in reliance upon the record title. *Henniges v. Paschke*, 489.
3. Where an action is brought in behalf of minors by their guardian it is incumbent upon the guardian to set out facts in an issuable form, in his complaint, which show his representative capacity and the character in which he sues, a complaint in such a case which does not do so is demurrable, but such demurrer must be special and upon the ground of want of capacity to sue, and unless so made such objection is waived. *Dalrymple v. Security Loan & Trust Co.*, 306.
4. Error in denying motion for directed verdict at close of plaintiff's case is waived unless the motion is renewed at the close of the entire case. *First Nat. Bank v. Red. River Valley Nat. Bank*, 319.
5. The refusal of the trial court to direct a verdict in defendant's favor, if error, was waived by counsel in consenting to the discharge of the jury and to a trial before the court. *Erickson v. Citizens Nat. Bank*, 81.
6. By consenting to a sale of grain covered by a chattel mortgage the mortgagee impliedly waived his lien in favor of the purchaser. *Peterson v. St. Anthony & Dakota Elev. Co.*, 55.

WAREHOUSEMEN. See PRACTICE, 49; CONSTITUTIONAL LAW, 213; TAXATION, 213, 346.

WILLS. See EXECUTORS AND ADMINISTRATORS, 428.

1. Where the same person is named in a will both as executor and trustee, and by the terms of the will is required to execute the trusts created thereby, the two capacities are distinct and independent of each other; and after taking possession of the assets as executor, he cannot relieve himself and his bondsmen, with respect to such assets, until discharged as executor, and cannot by his own mere mental operations cross the line dividing the two capacities of executor and trustee. *Joy v. Elton*, 428.

WORDS AND PHRASES.

1. The party residing upon land and for whose immediate use a building was constructed is the owner of the land within the meaning of section 5483, Rev. Codes. *Mahon v. Surerus*, 57.
2. The word "resident" as used in section 2755, Rev. Codes, is equivalent in meaning to the word "domicile." *Graham v. Graham*, 88.
3. The words "miscarriage" and "abortion" are not interchangeable terms within the meaning of section 7177, Rev. Codes. *State v. Belyea*, 353.

WITNESSES.

1. A non-expert witness cannot testify to an opinion without first giving the facts on which the opinion is predicated. *Olson v. O'Connor*, 504.

WRIT OF INJUNCTION. See INJUNCTIONS, 480.

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